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No. 83-_____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

SEARS, ROEBUCK AND CO.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether a district court's decision to dismiss an indictment on grounds of prosecutorial misconduct before a grand jury is subject to *de novo* review in the court of appeals.

2. Whether a district court may dismiss an indictment based on the likelihood that prosecutorial misconduct influenced a grand jury's decision to indict without proof that the grand jury *could not* have indicted the defendant in the absence of the misconduct.

PARTIES BELOW

The parties below, as shown in the caption of this case, are Sears, Roebuck and Co. and the United States of America. A list of the subsidiaries and affiliates of Sears, Roebuck and Co. is set forth in the Appendix.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Sears, Roebuck and Co., Petitioner herein, prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the Ninth Circuit is not yet reported and is set forth in its entirety in the Appendix hereto at 25a-41a. The opinion of the District Court for the Central District of California, reversed by the Ninth Circuit, is reported as *United States of America* v. *Sears, Roebuck and Co.*, 518 F. Supp. 179 (1981). It is set forth in the Appendix at 1a-24a.

GROUNDS FOR JURISDICTION

The decision below was issued and entered by the Ninth Circuit on September 19, 1983. Petitioner filed a

petition for rehearing with a suggestion for rehearing en banc. The petition for rehearing was denied on November 16, 1983. In accordance with Rule 20.1 of this Court, this petition was filed within sixty days of the date rehearing was denied. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

In June 1978, the United States convened a grand jury to investigate whether Sears, Roebuck and Co. ("Sears") had violated the United States customs laws in connection with its importation of televisions from Japan. On February 26, 1980, a grand jury returned an indictment against Sears alleging that Sears conspired to defraud the United States Government and filed false statements concerning the purchase price of television receivers which it imported from Japan.

Following the return of the indictment, Sears filed a pretrial motion in the district court seeking dismissal of the indictment on the grounds of prosecutorial misconduct before the grand jury. Prior to trial, the district court granted the motion to dismiss. The district court reviewed the facts and found that the prosecutor improperly prejudiced the grand jury against Sears. The prosecutor called a Sears competitor to testify concerning the ruinous impact of Sears television imports on the American economy and American workers — an issue wholly irrelevant to the offenses charged. The prosecutor harassed the Sears witnesses, accused them of lying in front of the grand jury, personally misrepresented facts, and failed to present undisputably exculpatory evidence despite a promise to the grand jury that he would have presented any exculpatory evidence if it had existed. The district court concluded that the indictment was based

upon "a Grand Jury proceeding that I can only characterize as unfair." 518 F. Supp. at 190, App. at 22a.

On September 19, 1983, a divided panel of the Ninth Circuit reversed the district court's dismissal of the indictment. The panel unanimously agreed with the district court that the prosecutor engaged in serious misconduct, stating that his conduct was "abusive"; "inflammatory and potentially prejudicial"; that "we cannot condone such excessive prosecutorial zeal"; that "it is undeniable that the prosecutor abused his prerogatives in conducting this grand jury investigation — and we stress again that we are dismayed by the tactics he employed"; and that "we deplore the prosecutor's conduct." App. at 29a, 31a, 34a, and 35a.

A majority of the panel nevertheless reversed the district court's ruling and reinstated the indictment based on two principal conclusions of law. First, the Court concluded that the district court's ruling was not entitled to any deference on appeal and that the reviewing Court was entitled to apply a "*de novo*" standard of review. Second, the Court found that a district court could not dismiss an indictment based upon the likelihood that the grand jury was prejudiced. It held that dismissal is proper only upon proof by the defendant that the grand jury "could not make" a proper determination of probable cause.

Applying these principles of review, the Court made what it called a "value judgment" and found that Sears had failed to demonstrate that the grand jury "could not make" a proper determination of probable cause.[1] App. at

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[1] Sears contends that the Court of Appeals not only failed to apply the proper standards of law, but that it also failed to give proper weight to the evidence supporting the District Court's finding that dismissal of the indictment was required.

34a and n.9. Sears requests this Court to review the Ninth Circuit's decision on certiorari.

REASONS FOR GRANTING THE PETITION FOR A WRIT OF CERTIORARI

This Court should grant a petition for certiorari. The decision of the Ninth Circuit directly conflicts with decisions of other Circuits, is contrary to the decisions of this Court, and raises important issues of federal law governing the administration of the Courts and the grand jury in the criminal process.

I

THE NINTH CIRCUIT'S DECISION THAT A DISTRICT COURT DISMISSAL OF AN INDICTMENT UPON THE GROUNDS OF PROSECUTORIAL MISCONDUCT BEFORE THE GRAND JURY IS SUBJECT TO *DE NOVO* REVIEW IS IN CONFLICT WITH DECISIONS RENDERED BY OTHER CIRCUITS AND CONTRARY TO DECISIONS OF THIS COURT

In reversing the district court's decision to dismiss the indictment, the Ninth Circuit expressly adopted a *de novo* standard of review. App. at 34a n.9. Thus, although the district court entered findings of fact concluding that the prosecutor engaged in prejudicial misconduct, the Ninth Circuit accorded no weight to these findings, and instead substituted its own judgment of the facts. The Ninth Circuit did *not* find that the district court had abused its discretion; that the district court's findings were clearly erroneous; or even that the district court's findings were unsupported by the evidence. Instead, in its own words, the panel made a "value judgment" completely at odds with the district court's findings of fact. *Id.*

By adopting a *de novo* standard of review, the Ninth Circuit has created a conflict in the circuits and departed from standards established by this Court.

A. The Ninth Circuit's Decision Is In Conflict With Decisions Rendered By The Fourth, Sixth, Eighth, Tenth, and Eleventh Circuits

No other federal court of appeals has adopted a *de novo* standard to review a district court's decision to dismiss an indictment for prosecutorial misconduct before a grand jury. Under the proper standard, the reviewing courts determine, first, whether the district court's findings are *clearly erroneous* and, second, whether the indictment's dismissal based on those findings constitutes an *abuse of discretion*. The Ninth Circuit rejected this standard of review which is well established in other circuits.

At least five courts of appeals have adopted this standard when reviewing a district court's decision whether to dismiss an indictment for prosecutorial misconduct before a grand jury:

(1) The Fourth Circuit. *United States* v. *Abbott Laboratories*, 505 F.2d 565, 574 (4th Cir. 1974), *cert. denied*, 420 U.S. 990 (1975) (holding that the district court's finding was clearly erroneous).

(2) The Sixth Circuit. *United States* v. *Smith*, 687 F.2d 147, 152 (6th Cir. 1982), *cert. denied*, ____ U.S. ____, 103 S. Ct. 752 (1983) (holding that the district court's findings were not clearly erroneous); *United States* v. *Nembhard*, 676 F.2d 193, 199, 200 n.4 (6th Cir. 1982) (holding that the district court abused its discretion and expressly reserving the issue of whether the district court's findings were clearly erroneous).

(3) The Eighth Circuit. *Beatrice Foods Co.* v. *United States*, 312 F.2d 29, 39 (8th Cir.), *cert. denied*, 373 U.S. 904 (1963) (opinion by Justice, then

Judge, Blackmun) (holding that the district court had not abused its discretion).

(4) The Tenth Circuit. *United States* v. *Pino*, 708 F.2d 523, 527-28 (10th Cir. 1983) (holding that the district court's findings were not clearly erroneous).

(5) The Eleventh Circuit: *United States* v. *Pabian*, 704 F.2d 1533, 1537-39 (11th Cir. 1983) (holding both that the district court's findings were clearly erroneous and that the district court had abused its discretion).

In a closely analogous context, other circuits have shown deference to a district court's decision to dismiss an indictment for the absence or incompetency of evidence before a grand jury. As when determining the extent and severity of prosecutorial misconduct before a grand jury, the district court relies primarily on grand jury transcripts. Yet, it is well-established that:

> A motion to quash an indictment for the absence or incompetency of evidence before the grand jury is addressed to the discretion of the trial court and its action thereon will not be reversed except upon a showing of abuse of discretion. *Stewart* v. *United States*, 8 Cir., 1924, 300 F. 769.

Carrado v. *United States*, 210 F.2d 712, 717 (D.C. Cir. 1953), *cert. denied*, 350 U.S. 938 (1956). *See, e.g.*, *United States* v. *Short*, 671 F.2d 178, 181 (6th Cir.), *cert. denied*, 457 U.S. 1119 (1982); *United States* v. *Flaherty*, 668 F.2d 566, 583 (1st cir. 1981); *United States* v. *Tane*, 329 F.2d 848, 853-54 (2d Cir. 1964).

Deference shown to a district court's decision on a motion to dismiss an indictment for prosecutorial misconduct is consistent with its traditional role as the finder of fact in the first instance. Because it observes lay jurors daily, a district court can better judge the degree to which jurors are prejudiced by different types of evidence and

manipulative tactics by counsel. A district court also has more information concerning the activities of prosecutors appearing before grand juries in that district, complaints of grand jury abuse, and the need at any particular time to sanction misconduct by dismissal of an indictment. The Ninth Circuit's use of a *de novo* standard to review and reverse the district court's dismissal of the indictment accordingly contravenes sound judicial administration as well as the decisions rendered by other courts of appeals.

B. The Ninth Circuit's Decision Is Contrary To Decisions Of This Court

The Ninth Circuit's decision to review the District Court's factual finding of grand jury bias *de novo* exceeded the bounds of appellate authority as interpreted by this Court. The Ninth Circuit directly contravened this Court's mandate that:

> [A]ppellate courts must constantly have in mind that their function is not to decide factual issues *de novo*. The authority of an appellate court, when reviewing the findings of a judge . . . is circumscribed by the deference it must give to decisions of the trier of fact, who is usually in a superior position to appraise and weigh the evidence.

Zenith Radio Corp. v. *Hazeltine Research, Inc.*, 395 U.S. 100, 123 (1969).

The Ninth Circuit sought to justify its departure from this mandate on the ground that the district court findings were primarily based upon a review of written transcripts. App. at 34a n.9. Yet, this Court has limited appellate review of district court findings to a "clearly erroneous" standard even when the district court findings represent "inferences drawn from documents or undisputed facts." *United States* v. *United States Gypsum Co.*, 333 U.S. 364, 394 (1948). *Accord, United States* v. *Singer Mfg. Co.*, 374 U.S. 174, 195 n.9 (1963).

Nor can the Ninth Circuit's departure from the clearly erroneous standard of review be justified by its conclusion that the issue of whether the grand jury was biased requires a "value judgment" rather than "traditional factfinding." App. at 34a n.9. This Court recently rebuffed a similar effort by the Fifth Circuit to avoid the strictures of the clearly erroneous standard of review. In *Pullman-Standard* v. *Swint*, 456 U.S. 273, 286 (1982), the Fifth Circuit found that the issue of whether an employer acted with a "discriminatory purpose" was a question of "ultimate fact," permitting it to render an independent determination of the issue. This Court found that the issue of discriminatory purpose—like the issue of grand jury bias here—was a question of fact to be resolved by the district court and only subject to reversal if clearly erroneous. This Court observed that the Fifth Circuit's assumption of *de novo* review "seems to us incredible." 456 U.S. at 293.

The district court in this case considered all the evidence and found that the grand jury which indicted Sears was biased by the misconduct of the prosecutor. The Ninth Circuit did not hold that this finding of fact was clearly erroneous, as required by this Court. The Ninth Circuit's conclusion that it was authorized to conduct a *de novo* determination of the facts presents an important question of federal law which should be reviewed by this Court.

First, the Ninth Circuit decision provides an excellent opportunity for this Court to resolve the conflict in the circuits and clarify the governing standards of review for appellate courts. The standard adopted by the Ninth Circuit was clearly articulated and not dependent upon the facts. Thus the issue is solely one of law readily reviewed by this Court. Second, in view of the number of

courts which have reached a conflicting decision on this issue, there is no reason to believe that the conflict created by the Ninth Circuit decision will be corrected by subsequent developments in the Courts of Appeals. Review by this Court is accordingly required to restore uniformity to the Circuits.

II

THE PROOF OF PREJUDICE REQUIRED BY THE NINTH CIRCUIT IS IN CONFLICT WITH DECISIONS RENDERED BY THE SECOND, THIRD AND FIFTH CIRCUITS

The Ninth Circuit also adopted an unfounded standard of proof governing the issue of whether prejudice resulted from the prosecutorial misconduct before the grand jury. The Court held: "Sears simply has not shown, as required, that the grand jury's independence was so undermined that it *could not* make an informed and unbiased determination of probable cause." App. at 34a (emphasis added). Thus, although the Ninth Circuit found that the prosecutorial misconduct was "potentially prejudicial" (App. at 29a), it nevertheless found no constitutional violation because, as an abstract possibility, the grand jury might have overcome the potentially prejudicial conduct and indicted Sears based solely on the evidence.

The standard of proof required by other circuits is whether there is a reasonable possibility that the prosecutorial misconduct could have influenced the grand jury's decision to indict. At least three Courts of Appeals have adopted this standard:

(1) The Second Circuit. *United States* v. *Hogan*, 712 F.2d 757, 762 & n.2 (2d Cir. 1983) (ordering an indictment's dismissal in part because, "[r]egardless of the government's intent, we believe that the grand jury was *probably misled* by this presentation" and

"appellants *might not* have been indicted") (emphasis added); *United States* v. *Ciambrone*, 601 F.2d 616, 623 (2d Cir. 1979) (stating that the prosecutor's failure to present exculpatory evidence is ground for an indictment's dismissal, "at least where it *might reasonably* be expected to lead the [grand] jury not to indict") (emphasis added).

(2) The Third Circuit. *United States* v. *Serubo*, 604 F.2d 807, 816-17 (3d Cir. 1979) (construing its decisions in earlier cases to mean that an indictment's dismissal is unnecessary where "the prosecutor's misconduct *could not have had any material effect* on the grand jury's decision to indict") (emphasis added).

(3) The Fifth Circuit. *United States* v. *Head*, 586 F.2d 508, 512 (5th Cir. 1978) (holding that, in order to warrant dismissing an indictment for prosecutorial misconduct, "a defendant must offer *some indication* that the prosecutor's action prejudiced him in making his defense") (emphasis added).

Petitioner is aware of no decision of this Court addressing the standard of prejudice governing the dismissal of an indictment. The Ninth Circuit opinion accordingly presents this Court with an opportunity to resolve the conflict and confusion in the precedents of the Courts of Appeals.[2] Because this standard of proof adopted by the Ninth Circuit is virtually impossible to satisfy, the deci-

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[2] To the extent this Court's decision in *United States* v. *Hastings*, ___ U.S. ___, 103 S. Ct. 1974 (1983), has any application to the issue presented, the decision suggests the impropriety of the standard adopted by the Ninth Circuit. The Ninth Circuit did not ask whether "absent the prosecutor's [misconduct] . . . is it clear . . . that the [grand] jury *would have* returned [an indictment]" — the standard suggested by this Court's decision in *Hastings* (emphasis supplied). 103 S. Ct. at 1981. Instead, the Ninth Circuit asked whether it was clear that the grand jury *could not* have indicted absent the misconduct.

sion effectively strips defendants of any due process protection against improper indictment and leaves the grand jury exposed to unchecked manipulation by overreaching prosecutors. The Ninth Circuit's decision accordingly presents issues of substantial importance to the proper administration of the criminal process in the federal courts.

III

THE DECISION BELOW IS RIPE FOR REVIEW

The Ninth Circuit reversed the district court's dismissal of the indictment and remanded the case for trial. This Court unquestionably has jurisdiction under 28 U.S.C. § 1254 to review decisions of the Courts of Appeals which do not represent final judgments. *See, e.g., Forsyth* v. *City of Hammond*, 166 U.S. 506 (1897). This Court has repeatedly exercised its discretion to review issues on certiorari prior to final judgment, where, as here, "the interest of judicial economy" is better served by a prompt resolution of the questions presented than by postponement of review until entry of a final judgment. *See, Estelle* v. *Gamble*, 429 U.S. 97, 115 (1976) (Stevens, J., dissenting from the Court's grant of certiorari).

First, review on certiorari is necessary to resolve a conflict in the circuits created by the decision in this case. Judicial economy is not served by postponing review of a conflict. The delay would only result in uncertainty in the Courts of Appeals and an increase in the number of decisions subject to review for error on this question. For this reason, this Court has granted certiorari prior to final judgment in order to resolve conflicts on a number of occasions. *See, e.g., Forsyth* v. *City of Hammond*, 166 U.S. at 515; *United States* v. *General Motors Corp.*, 323

U.S. 373, 377 (1945); *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 43-44 (1938).

Second, judicial economy is best served by review at this stage because reversal of the Ninth Circuit decision would preclude the need for trial. Since the district court decision reviewed by the Ninth Circuit represented a final judgment—the dismissal of the indictment—no further proceedings would be required if the trial court decision was in fact proper. This Court has granted review in similar circumstances where further proceedings might be avoided by resolution of the issue on certiorari. *See, e.g., Estelle* v. *Gamble*, 429 U.S. 97 (1976) (reviewing interlocutory decision of a court of appeals reinstating a complaint dismissed by the district court); *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 684-85 (1949) (reviewing interlocutory decision of court of appeals reinstating a complaint dismissed for lack of jurisdiction.)

Third, this petition presents important questions concerning the role of the grand jury and the proper administration of the courts. This Court has, in the past, emphasized the importance of prompt review of similar issues. *See, e.g., Beacon Theatres, Inc.* v. *Westover*, 359 U.S. 500, 501 (1959) (reviewing denial of a jury trial before final judgment because "maintenance of the jury as a fact-finding body is of such importance"); *American Construction Co.* v. *Jacksonville T&KW RR Co.*, 148 U.S. 372, 387 (1893) (finding interlocutory review appropriate where the issue is "a novel and important one, deeply affecting the administration of justice in the court of appeals.").

Delaying review of the questions presented until after trial would therefore be inappropriate in this case. If Sears is acquitted, the conflict created by the Ninth Cir-

cuit decision will remain, but this Court will have lost the opportunity to resolve it. Further, Sears will have been needlessly subjected to a criminal trial on the basis of an improper indictment. This Court should accordingly exercise its discretion to review the issues presented at this time.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Ninth Circuit in this case.

Dated: January 6, 1984

Respectfully submitted,

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APPENDIX

UNITED STATES DISTRICT COURT.
C.D. CALIFORNIA
June 26, 1981.

No. CR 80-183-R

UNITED STATES OF AMERICA,

Plaintiff,

v.

SEARS, ROEBUCK AND COMPANY, INC.

Defendant.

Company brought a motion for dismissal of the indictment charging it with conspiracy to defraud the United States and to commit offenses against the United States. The District Court, Real, J., held that: (1) the indictment would be dismissed due to prosecutorial misconduct before the grand jury where prosecutor issued "forthwith" subpoenas for company's attorneys in violation of Department of Justice policy, prosecutor in disregard of his obligation to be fair and objective in his questioning of witnesses constantly demanded "yes" or "no" answers to questions by company employees, and where prosecutor unveiled his own personal hostility with increasing comments amounting to unsworn testimony and misstatements of the law, in that prosecutor's conduct so seriously undermined the independence and objectivity of the grand jury that it impinged upon constitutional due process, and (2) counts of the indictment concerning acts committed more than five years prior to the indictment would be dismissed due to expiration of the statute of limitations despite Government's claim of waiver of the statute of limitations by reason of a letter signed by counsel for company.

Motion granted.

Asst. U.S. Atty. Frederick A. Jacobsen, Asst. U.S. Atty. Herbert B. Hoffman, Sp. Asst. U.S. Atty. Paul G. Gorman, Los Angeles, Cal., for plaintiff.

Stephen D. Miller, Beverly Hills, Cal., for defendant.

OPINION

REAL, District Judge.

Sears, Roebuck and Company, Incorporated (hereafter SEARS) has renewed its motion for dismissal of the indictment on the ground of prosecutorial misconduct in presentation of the matter to the Grand Jury.

Several reasons are given by SEARS warranting dismissal. They are:

1. Failure of the government to provide the Grand Jury available exculpatory evidence tending to negate the necessary criminal intent for violation of 18 U.S.C. § 542.

2. The treatment by the government of witnesses who were employees or lawyers of SEARS.

3. The issuance of forthwith subpoenas for immediate testimony of SEARS lawyers concerning the production of documents while a motion concerning those documents was pending before the Court.

4. The failure of the lawyer for the government presenting the matter to the Grand Jury to comply with the Local Rules of this Court concerning admission to practice.

5. Disclosure of a previous witness' testimony to another witness without leave of Court as required by Rule 6(e) Federal Rules of Criminal Procedure.

6. The presentation of witness John J. Nevin, Chairman of the Board of Zenith Radio Corporation, who had no relevant evidence.

7. The conduct of the attorney for the government in his comments and instructions to the Grand Jury.

The history of this case is long and involved and is really not necessary to an understanding and determination of the present motion. It is enough to say that an indictment was returned by the Grand Jury against SEARS on February 26, 1980 charging conspiracy to defraud the United States and commit offenses against the United States. The indictment is in one conspiracy count and twelve substantive counts charging violation of 18 U.S.C. § 542, Entry of Merchandise into the Commerce of the United States by means of false statements.

The impact the conduct of the attorney for the government in this case had upon the Grand Jury can only be appreciated when it is understood that though programmed as a "false statement" case the facts and applicable law are most intricate and elusive, involving rather esoteric concepts of the customs laws of the United States.

From the original establishment of "12 knights or 12 good and lawful men of every hundred and four lawful men of every vill," by Henry II in 1166 to its introduction to Anglo-American jurisprudence in 1635 the Grand Jury has ideally come to be the shield against over-zealous or politically motivated prosecutors in our American system of criminal justice. The early days were not easy ones. The tyranny of English rule in the colonies tested at every turn the right to an indictment by a Grand Jury but could never succeed in dominating this "basic right of an Englishman." The determination of colonial Americans fighting the tyranny of English kings brought constitutional recognition to the right to Grand Jury indictment with its inclusion as the first sentence of the 5th Amendment to the Constitution.

The Fifth Amendment requirement that infamous crimes be prosecuted by indictment constantly reminds us of the necessity of maintaining a Grand Jury system vigilant to the admonition of the United States Supreme Court in *Wood* v. *Georgia*, 370 U.S. 375, 390, 82 S.Ct. 1364, 1373, 8 L.Ed.2d 569 (1962)

> "Historically, this body has been regarded as a primary security to the innocent against hasty, malicious and oppressive prosecution; it serves the invaluable function in our society of standing between the accuser and the accused, whether the latter be an individual, minority group or other, to determine whether a charge is founded upon reason or was dictated by an intimidating power or by malice and personal ill will."

It is with these important underpinnings in mind that a Court must approach the serious charges made by SEARS of Grand Jury abuse in this case.

The Grand Jury investigation of SEARS commenced with the issuance of a subpoena duces tecum served on June 30, 1978. The subpoena required the production of documents that was to be answered with one thousand three hundred cartons of records. A later agreement was made between SEARS and the government to delay production until December 18, 1978. The answer from SEARS came in two ways, 1. approximately seven hundred cartons were delivered to the courthouse for presentation to the Grand Jury,[1] and 2. SEARS filed a Motion to Quash or Modify the Subpoena Duces Tecum [In re: Grand Jury Subpoena, Misc. No. 7174. United States District Court for the Central District of California] objecting to the production of the remaining three hundred cartons, or alternatively to permit copies to be delivered instead of the originals.

The hearing on the Motion to Quash or Modify was set before the Honorable David W. Williams on the morning of December 18, 1978 at 9:30 A.M. After the hearing Judge Williams submitted the matter for decision. SEARS then advised the government of the delivery of the seven hundred cartons of documents and also told Paul Gorman, the attorney for the government, that it was withholding delivery of the remaining three hundred cartons pending Judge Williams' decision. SEARS also advised Mr. Gorman that after the decision SEARS would deliver the remaining documents in accordance with Judge Williams' ruling on the Motion to Quash.

Despite the government's knowledge of SEARS position Robert R. Thomas[2] was called before the Grand Jury and interrogated in such a way as to indicate to the Grand Jury that SEARS had failed totally to comply with the requirements of

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[1] The prosecutor declined to accept delivery of the seven hundred cartons of records until after he could interrogate Robert R. Thomas before the Grand Jury.

[2] Mr. Thomas was the SEARS employee designated to be SEARS authorized representative before the Grand Jury.

the subpoena.[3] After excusing Mr. Thomas from further testimony, Mr. Gorman added further fuel to the fire already kin-

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[3] Typical of the questioning of Mr. Thomas on this subject is as follows:

Q: May I inquire, first of all, no accounting records kept by the headquarters of Sears have been produced?

A: Not to my knowledge. I believe all the headquarters records are being held, Mr. Gorman.

Q: And the reason for that is what?

A: I can't say, sir. That was our legal instructions of our legal counsel.

Q: You are representing Mr. ——

A: Swift.

Q: —Mr. Swift, and then someone advised you that some records pursuant to the subpoena were not being produced.

Sir, who advised you of that?

A: I was advised by that Mr. Lipnick of our attorneys, Arnstien, Gluck, Weitzenfeld & Minow. Two of the partners are here today.

Q: And Mr. Lipnick is a partner of that firm?

A: Yes.

Q: And I believe Mr. Weitzenfeld is here also?

A: Yes.

Q: And it was from their decision not to provide any accounting records within the headquarters?

A: The headquarters records, right, sir.

Grand Jury Transcript, Robert R. Thomas, December 18, 1978 pp. 17-18.

Q: Okay. And there are no accounting records, there are no records whatsoever that have been produced?

A: Not here, sir.

Q: I want to keep the TV department records for last.

What other records or documents pursuant to the subpoena to your knowledge, have not been produced?

A: Well, it would our comparison shopping department.

Q: What does that include?

dled by the government. Mr. Gorman personally demanded and then served subpoenas on Stanley Lipnick and Burton

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A: That would include all records where we went out and competitively shopped competition comparing them to units of our own as to the values and so on, and that would show pricing comparisons. That is the reason we pulled those out of the files.

Q: Why were they not produced?

A: Can't answer that, sir.

Grand Jury Transcript Robert R. Thomas, December 18, 1978 pp. 20-21.

Q: You have no knowledge as to why they were not produced?

A: No sir. That was our attorneys' decision.

* * * * * *

Q: We are getting back to 760. That is Mr. Lipnick and Mr. Weitzenfeld simply advised these should not be produced and you have no personal knowledge as to why?

A: To the best of my knowledge, that is correct.

Q: You have no knowledge as to why?

A: No sir.

Q: So what you are saying is the company did not respond to the subpoena at all, nothing in here is included?

A: For the most part, I would guess—for the most part, with the exception of some fiche and some film and the catalog records.

Grand Jury Transcript, Robert R. Thomas, December 18, 1978 pp. 28 & 29 & 86.

Q: Well, in the complete subpoena, your statement is that nothing in the subpoena has been produced with the exception of the fiche and film?

Grand Jury Transcript, Robert R. Thomas, December 18, 1978, p. 87.

and the critical Grand Juror reaction

A JUROR: But I fail to understand why when a subpoena is sent and all this is brought together, why the merchandising material is not here.

Grand Jury Transcript, Robert R. Thomas, December 18, 1978 p. 93.

These excerpts are not exhaustive of the occasions upon which Mr. Gorman approached the subpoena matter as "the company did not respond to any of the provisions of the subpoena."

Weitzenfeld[4] (the SEARS lawyers who had accompanied Mr. Thomas with the records) to appear forthwith before the Grand Jury.[5]

Appearing before the Grand Jury Mr. Lipnick[6] declined to answer questions propounded by Mr. Gorman until he had an opportunity to consult an attorney.[7] Mr. Weitzenfeld's appear-

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[4] This action by the government was termed "an extraordinary move" by Judge Williams when he was made aware of the subpoenaing of lawyers for a target before the Grand Jury.

It also appears to be in violation of Department of Justice policy expressed in the *United States Attorneys' Manual* Section 9-11.230 which provides:

> All Grand Jury witnesses should be accorded advance notice of their appearance before the Grand Jury. "Forthwith" . . . subpoenas should be used only when swift action is important . . . Considerations, among others, which bear upon the desirability of using such subpoenas include . . . (1) the risk of flight; (2) the risk of destruction or fabrication of evidence; (3) the need for the orderly presentation of evidence; and (4) the degree of inconvenience to the witness.

None of these criteria were met in this case.

[5] Mr. Lipnick adivsed Mr. Gorman that he intended to seek an immediate hearing before Judge Williams to determine the propriety of the subpoenas. In answer, Mr. Gorman, threatened Mr. Lipnick with immediate arrest by the United States Marshal.

[6] This appearance was because of the unavailability of Judge Williams to hear the matter and the threats of the prosecutor to have him arrested.

[7] The pertinent questioning of Mr. Lipnick is as follows:

> Q: What is your privilege, on what grounds?
>
> A: I respectfully request an opportunity to retain and consult with counsel before I give testimony to this Grand Jury on the subject that you have just asked.
>
> Q: Without knowing what the questions are going to be? What good would it do you to retain counsel and to ask them?
>
> Are you aware of your rights before the Grand Jury?
>
> A: I think I have a right to retain and be advised by counsel, Mr. Gorman—

ance mirrored and exacerbated the Lipnick problem.* The manner of questioning Mr. Lipnick and Mr. Weitzenfeld by the

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Q: All right—

A: —And I am requesting that I be permitted to exercise that right.

Q: Mr. Lipnick, were you provided a subpoena in the hall by me?

A: Yes sir.

Q: At a time at—

A: At 2:00 o'clock I was served with a subpoena.

Q: And did that subpoena provide to you an Advise of Rights form?

A: It had a form attached to it.

Q: Did you read it?

A: Yes, sir.

Q: Did you understand it?

A: I believe so.

Q: Do you have any questions on it?

A: No sir.

* * * * * *

Q: Well, I will ask you questions and for each question that you do not wish to answer, you may exercise that right and we will put in on the record if you feel you have today that right. However, I must advise you that I do not agree with you and that a failure to answer questions properly placed to you before this Grand Jury will receive further litigative action.

Are you aware of that situation?

* * * * * *

MR. GORMAN Q: For the record, Mr. Lipnick is making a general refusal to testify based on the fact that he has not had the opportunity to confer with counsel prior to his accepting a Grand Jury subpoena although Mr. Lipnick has stated that he has spoken with Mr. Weitzenfeld and he has been an attorney for several years.

*The pertinent questioning of Mr. Weitzenfeld is as follows:

Q: Did you direct a production of documents based on a Grand Jury subpoena served upon Sears Roebuck on or about July 30th, 1978?

government and Mr. Gorman's remarks prompted a Grand Juror to ask:

"A JUROR: How can you force them? In other words, what I mean is they have got the privilege of getting another lawyer even though, I agree with you that they

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A: Mr. Gorman, at—I believe it was a little after 2:00, although I did not look at my watch. I was served with a subpoena to appear here at 2:00 p.m. As a lawyer, I would like to and as a man, I would like to answer all of your questions but as a lawyer of that many years standing, I believe strongly that my interest, the interest of my client, in the interest of orderly proceedings and justice are best served by my being represented by counsel and until such time as I have engaged counsel, I have not had the time to do so now, I would with due respect to you people—and sorry to keep you here this late this afternoon—respectfully deny—refuse to answer any questions.

Q: Based on what grounds, sir?

A: On the grounds that I desire to employ counsel and seek the advice of counsel in connection with how this matter is be to proceeded—as is to proceed.

Q: Were you provided and Advice or Right form?

A: I beg your pardon?

Q: Were you provided in Advice of Rights form which I handed you with the subpoena today?

A: Mr. Gorman, you will have to hand me the document and ask me what I—whether I was given a copy of a specific form rather than to use—

Q: Answer the question yes or no, Mr. Weitzenfeld.

A: I am not familiar with your form, sir.

Q: Were you handed a form which advised you of your rights before this Grand Jury?

A: I will give you, sir, what I was handed and you can call them whatever you wish.

Q: Please refresh your memory with it.

A: It's an Advise or Rights form, yes, I see it.

Q: The answer to your question is yes, you have been provided that Advise of Rights form?

A: Yes I have.

Q: Have you read it?

A: Yes, I have.

are lawyers, they ought to know what they can say and can't say."

Q: Do you understand it?

A: Yes I do.

Q: And do you have any questions regarding it?

A: No, sir, I don't have any question.

Q: Do you as an attorney have you legal knowledge for the basis for the denial based in law and fact of refusing to testify today? In other words, are you refusing to testify based on a sound legal principle recognized by the Court?

Grand Jury Transcript, Burton Y. Weitzenfeld, December 18, 1978, pp. 3-5.

Parenthetically—the Advise of Rights form provides that a witness is entitled to consult with an attorney concerning a Grand Jury appearance and have counsel present (outside the Grand Jury room) to consult *during* the testimony.

Not satisfied, Mr. Gorman proceeds:

Q: All right. Are you aware that refusal to answer any questions will bring furter litigative action?

A: Yes sir, I am aware of it.

Q: Okay, based on Mr. Weitzenfeld's refusal and his statement that no further questions will be answered by him pursuant to his claim of not retaining counsel, at this time I am not going to ask him any further questions.

If the Grand Jury has any questions they wish to put to Mr. Weitzenfeld, please feel free to do so at this time.

I will ask the foreman not to release Mr. Weitzenfeld but to allow him to wait in the other room until we have had a chance to discuss and consider further conditions with the Grand Jury.

The Foreman: Okay.

Mr. Gorman: Thank you, Mr. Weitzenfeld.

The Witness: Thank you. Thank you.

(Whereupon the witness was excused from the Grand Jury room.)

Mr. Gorman: Okay, we have not gone off the record.

You have had two attorneys before you. They refused to answer based on what may or may not be a valid privilege. *Personally, I do not think it is.* (emphasis added).

Grand Jury Transcript, Burton Y. Weitzenfeld, December 18, 1978, pp. 7-8.

Instead of clearing the air Mr. Gorman, fully aware of the pending motion and SEARS' position on the totality of the document subpoenaed, answered:

> "If the Court directs them to testify they will testify."

At this early stage of the investigation the effect this conduct had on the Grand Jurors can only be expressed in what the record shows one of the Grand Jurors said about the whole episode:

> "A JUROR: Well both of them kind of angered me in that I know everybody has a right to a lawyer but them being attorneys . . ."

Grand Jury Transcript, Burton Weitzenfeld, December 19, 1978, pp. 8-9.

No one can question that the "forthwith" subpoenas for Mr. Lipnick and Mr. Weitzenfeld were in violation of Department of Justice policy.[9] Such violation, no matter how egregious, does not necessarily infect the Grand Jury process in returning an indictment. It is relevant, however, to set the tone of this entire investigation and defines at the outset the overreaching of the government in its presentation to the Grand Jury. *United States* v. *Wilson*, 614 F.2d 1224, 1227 (9th Cir. 1981).

The comments of Mr. Gorman and the nature of his probe into the request for the right to consult a lawyer with Messrs. Lipnick and Weitzenfeld were just the beginning of the perni-

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[9] Sections 9-11.230 of the *United States Attorneys' Manual*, entitled "Limitations on the Grand Jury Subpoena" provides:

> "All Grand Jury witnesses should be accorded reasonable advance notice of their appearance before the Grand Jury. '[F]orthwith' . . . subpoenas should be used only when swift action is important . . . Considerations among others, which bear upon the desirability of using such subpoenas include . . . (1) the risk of flight; (2) the risk of destruction or fabrication of evidence; (3) the need for the orderly presentation of evidence; and (4) the degree of inconvenience to the witness." *United States Manual*, Section 9-11.230.

cious disregard of the duty of fairness which must be imposed upon an attorney for the government in Grand Jury proceedings. Here it is obvious that the effect was prejudicial to SEARS' right to a dispassionate and unprejudiced view of the evidence.

The hostility of government counsel throughout the questioning of James K. Flummerfelt, Jerome Brennan, Dennis R. Allen, Robert R. Thomas, Edward D. Maxwell, John Stanley Noble,[10] W. C. Hicks and C. William Van Tilberg can best be

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[10] Grand Jury Transcript, John Stanley Noble, October 23, 1979, pp. 159-160.

After excusing Mr. Noble this colloquy transpired:

A JUROR: I am interested in something. Do you feel that he was aware there was a two-way situation, that a price, on the agreed price a negotiated price, that he was aware of the lower price or the higher price at that time when he made—when he was making up his forms to send to the Customs officials? Do you feel that he was aware of that at that time?

MR. GORMAN: Well, you have to realize where the situation usually occurred. The invoice and everything came from the manufacturer, from Sanyo, okay? That would come with the merchandise over to the custom house broker, like here in Los Angeles. The broker would look at it and say, "Okay, here is the information, send it to Customs."

Okay, the broker is really not aware of what is going on. I am saying that he was advised by Mr. Brennan that there was number one, a rebate situation going on and that there was an over and under situation, billing situation going on under ordinary circumstances that would indicate to him that the prices given to Customs were not the actual price, and that he would have the responsibility to go to Customs and tell them that. He is saying, "No, I did not do this even though it was my responsibility because Brennan and Robinson told me they were taking care of it."

What he did admit to was this was the only instance that he did do this and it was his responsibility. I mean, it creates a great big area of question why this is the only one and why you go outside the scope of your authority.

He did say that nobody in his line of authority told him not to do this, only the fact that this guy—these people told him not to."

summed up in a colloquy between Mr. Gorman and the Grand Jury during Mr. Flummerfelt's testimony on October 24, 1979.[11] The statements of Mr. Gorman read like a scathing

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[11] The pertinent colloquy is found in the transcript of the testimony of James K. Flummerfelt on October 24, 1979, pp. 71-76 as follows:

MR. GORMAN: We are back on the record now while Mr. Flummerfelt is outside the Grand Jury room. I am trying not to twist these questions. I am trying to be as clear and as logical as I possibly can. If the jury thinks that I am in any way trying to trick or twist or anything, I am trying to get an answer of how much did the thing cost. No matter if you send a check or a letter of credit to somebody or a $100 bill to somebody, if you know that you are purchasing something and you expect money back, if you give them a check for $110 to purchase something and you know that you are going to be receiving $10 back, how much does the item cost?

A JUROR: That's a straight question.

A JUROR: But he doesn't receive it back until he buys the black and white, right?

MR. GORMAN: He is expecting. What he has testified to is there is an overbilling because of some system where Sears allowed itself to be billed over its agreed price. You and I agree to a price and that amount, he said, he expected a return. He said, and I am sure he testified directly, he said that he expected all of the overbilling to be returned at some time to Sears.

Let us say the overbilling in this case is $10. If he made this arrangement, this whole transaction even though he sent the letter of credit or even though he would have sent a check or whatever, if he expected a $10 return how much did it cost? Is there anybody here who has any problem with my question? I am making it as simple and basic to him as I can.

A gentleman had his hand up? Does that answer your question?

A JUROR: There seems to be some difficulty in him establishing the fact that there is a $10 thing that he keeps talking about contracts. Well, if they made a conract, there had to be some kind of consideration here, and the consideration was money or the exchange of goods that he's going to get back later which was the $10 or whatever amount, like you said, X. And it seems to me that he can't get his terms or definitions of what you're talking about or he wants to—

MR. GORMAN: *Cannot or will not.* (emphasis added)

A JUROR: Well, will not. But it's the same thing that occurred yesterday.

argument giving the personal opinion of a prosecutor on the credibility of a witness that would not withstand attack for misconduct if made to a petit jury during trial.

MR. GORMAN: Take that into consideration. I may think it is will not; you may think it is cannot. I do not want to influence you. It is not my job. I can tell you the possibility or he may be trying to evade to protect the company. That is one of the things you have to consider in your interpretation of his testimony. *But to me, anyway, and if anybody in the Grand Jury thinks it is different it defies logic in that scenario*—he testified to the fact that he knew they were getting that entire overbilling back. If they were getting it back, how much did that item cost? If he said it still cost $110, then something is really wrong to my way of thinking. If anyone in the Grand Jury thinks differently, I would like you to bring it up either to me or to him. (emphasis added)

A JUROR: It sounds like they're also thoroughly indoctrinated onto this plan that they can't seem or won't—

MR. GORMAN: I cannot comment on that.

There was a contract made, whether verbal or written, but it seems to be that it is in the records that there have been considerations made with the sets from Korea, but they do not seem to expand on the fact that this was a consideration that was given to Sears. First of all, he did say that he was expecting a return somehow. The question is that if he was expecting a return, in our terms for the statute, for this violation, if they were expecting the overbilling to be returned, what was the true unit cost to be placed on the Customs documents? When we meet next time I am going to read all the invoice requirements for Customs documents to make sure your decision is right out of the U.S. Code. Today I can tell you that one of the requirements is they give the actual cost.

Now, the function of the Customs service is to determine what is coming in. Is it going to harm our health, welfare, morals, whatever, economy? It has to be described accurately so the Customs service can determine what it is. They have to appraise it for value or duty. One of the ways of appraising it is by how much does it cost. That is not the only way, but it is one of the ways. So they are required by law not only to give the unit price, what they are actually paying for it, but also any financial aspects of the transaction which would, if not given, preclude Customs from knowing everything about the transaction or if given, allow Customs to examine all aspects of the transaction and give a proper duty appraisement. For our purposes, value is secondary to whether or not they gave the correct statement.

We are talking about overbilling for a second. If they had an overbilling amount where they told Customs that this item cost

The prosecutor in patent and flagrant disregard of his obligation to be fair and objective in his questioning of witnesses before a Grand Jury[12] constantly demanded "yes" or "no" answers to questions that concerned complex practices that

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$110, and they knew they were receiving $10 of that back, then what is the unit cost? In my way of thinking it is $100. If that is correct and if they put down $110 when they knew it was $100 because they expected the $10 back, then you have an entry by means of a false statement because it is not $110. If they knew about it, it is the knowledge requirement that leads to the felony charge, those three elements.

Conversely on the undervaluation—that is why I tried to separate it because when I come back to you, the overvaluation for the most part is beyond the statute of limitations, so I have to rely on the undervaluation. The classic Customs fraud case—I told you people this before—is where an importer says, "Well, I'm buying these units at $1.00 a unit, but I'll tell Customs it's only 50 cents a unit and then I'll only have to pay half as much duty and I'll save myself a lot of money."

In this overvaluation situation, they probably paid more duty. Now, there are a lot of reasons why they probably did that. They are in this over-under billing situation. They paid more duty than they would have had to pay so they might be getting a refund. They could go to Customs and say, "Give me a return." They have not done that.

We have separated to the other half the underbilling situation. What they are saying is, "Well, we paid"—I am interpreting now what they would say. "We paid too much duty here. Therefore, even though we made a false statement, therefore, we are making another false statement on the other side to undervalue below the negotiated price to return all this money that we overvalued."

(Whereupon the witness reenters the Grand Jury room)

MR. GORMAN: We are still on the record. I am still speaking.

Therefore, they should counterbalance or offset and the real question is: Is an accurate, complete and true statement made on either side.

[12] "It is the duty of a prosecutor presenting a case to a Grand Jury not to inflame or otherwise improperly influence the jury against any person." *United States* v. *Di Grazia*, 213 F.Supp. 232, 235 (N.D.Ill.). *See also United States* v. *Abbott Laboratories*, 369 F.Supp. 1396 (E.D.N.Car. 1973). Standard 5.7 of the *American Bar Standards for*

were not susceptible of one-word answers. When SEARS employee Dennis Allen[13] objected that he could not answer a hypothetical question because the prosecutor was putting words into his mouth the prosecutor responded, "you sound like an Abbott and Costello movie."[14]

The questioning of Mr. Flummerfelt also points up in the totality of the presentation of why the government would be obligated to provide the Grand Jury with the deposition of Mr. John B. Rehm of November 30, 1979[15] on the crucial issue of

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Criminal Justice: The Prosecution Function (1st ed. 1971) provides, in pertinent part:

> "The interrogation of all witnesses shall be conducted fairly, objectively and with due regard for the dignity and legitimate privacy of the witness, and without seeking to intimidate or humiliate the witness unnecessarily."

[13] Grand Jury Transcript, Dennis Allen, November 7, 1979, p. 83.

[14] When Mr. Allen was unable to provide "yes" or "no" answers to various poorly phrased questions he was threatened with contempt proceedings as follows:

> Q: It is still in consideration?
>
> A: Consideration for what?
>
> Q: I am going to ask you one more time and I am going to—if you don't answer yes or no, I am going to ask you to return tomorrow. I am going to put you before a judge. I am going to have you get before a judge and I am going to say, "Judge, will you please instruct the witness to say yes or no."
>
> Now I want a yes or no out of that.

[15] The government had taken the deposition of John B. Rehm, a lawyer that had been engaged by SEARS to represent it in connection with its importation of Japanese television receivers.

Mr. Rehm's deposition indicated that he had advised SEARS that the handling of disclosures to Customs was proper. He also explained much of the technical aspects of customs entry of imported goods particularly in the context of this case.

This deposition was never presented nor was the Grand Jury advised of its existence. Neither was the Grand Jury advised of certain disclosures that had been made to Customs as early as 1971.

intent and the concept of price—agreed, contract, actual, invoice—that was defined only in terms of Mr. Gorman's personal view of this complex economic principle.[16] The prosecutor totally ignored the comment of the United States Supreme Court in *United States* v. *Calandra*, 414 U.S. 338, 94 S.Ct. 613, 38 L.Ed.2d 561 (1974) where commenting upon the broad scope of the Grand Jury's investigative duties the Court indicates an investigation is not complete

> "until every available clue has been run down and all witnesses examined in *every proper way* to find if a crime has been committed" Id. 414 U.S. at 344, 94 S.Ct. at 618 (emphasis added)

The government argues that the hostility of the prosecutor to the Grand Jury witnesses that were SEARS employees was proper and prompted by the evasive manner in which these witnesses were testifying. Hostility, like beauty, may well be in the eyes of the beholder. This Court views the questioning by Mr. Gorman as a running argument to the jury of his own views of the facts as he would have them be rather than an attempt to elicit facts in such a manner as to make a clear and unbiased presentation to the Grand Jury in the very technical aspects of customs laws. The incessant commands of the prosecutor ordering SEARS employees to respond "yes" or "no" to complex, unintelligible and argumentative questions girded with his sarcastic remarks was calculated to and did deprive the Grand Jury of its ability to fairly view the testimony of SEARS employees.

The Grand Jury is an independent constitutional creation relegated to no particular branch of our government. *United States* v. *Chanen*, 549 F.2d 1306 (9th Cir. 1977). Because of its independence and neutrality the Grand Jury has traditionally

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[16] This is especially true since Mr. Gorman, questioning Customs Agent Albert Wetzel put interpretations on the so-called "Rehm memo" without the explanations made by Mr. Rehm in his deposition. Grand Jury Transcript, Albert C. Wetzel, February 26, 1980.

been termed an "arm of the Court." Grand Jurors are drawn from voter's lists to assume, without previous experience, a terribly important role in the complexities of our criminal justice system.

A Grand Juror's role involves two separate but closely related functions, viz., investigating whether or not possible violations of federal law occurred; and returning indictments if probable cause exists to conclude that an offense was committed and the proposed defendant committed it. See *Hendricks* v. *United States*, 223 U.S. 178, 184, 32 S.Ct. 313, 316, 56 L.Ed. 394 (1912); *Blair* v. *United States*, 250 U.S. 273, 282, 39 S.Ct. 468, 471, 63 L.Ed. 979 (1919). The independence of its function has been described by the United States Supreme Court in *United States* v. *Dionisio*, 410 U.S. 1, 16-17, 93 S.Ct. 764, 772-73, 35 L.Ed.2d 67 (1973) as:

> "The Fifth Amendment guarantees that no civilian may be brought to trial for an infamous crime 'unless on a presentment or indictment of a Grand Jury.' This constitutional guarantee presupposes an investigative body 'acting independently of either prosecuting attorney or judge' *Stirone* v. *United States*, 361 U.S. 212, 218, 80 S.Ct. 270, 273, 4 L.Ed.2d 252 (1960) . . . whose mission is to clear the innocent, no less than to bring to trial those who may be guilty."

It is to guarantee this independence and impartiality that the role of the attorney for the government must be one of very special sensitivity. The prosecutor represents—much like the judge in a trial—a dominant figure and the only person to whom the Grand Jurors can realistically look for guidance in their moment to moment concerns as the investigation unfolds. The prosecutor fills this position without the counterbalance of an opposing counsel objecting to any overstepping or of a trial judge maintaining the balance necessary to an impartial consideration by the Grand Jury.[17]

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[17] There has been much criticism of the Grand Jury process as a rubber stamp for prosecutors. This case particularly points up the need for an independent advisor and auditor who could monitor

It is in this performance of his duties before a Grand Jury that the attorney for the government must leave the advocate's role. It is here that the attorney for the government must leave a prosecutor's feel of "the thrill of victory" outside the Grand Jury room. It is here, in the hands of the attorney for the government "[t]he greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding" *Olmstead* v. *United States*, 277 U.S. 438, 48 S.Ct. 564, 72 L.Ed. 944 (1928) (Brandeis, J. dissenting at p. 479, 48 S.Ct. at 573).

It is when the neutrality of the prosecution is questioned for flagrant overreaching that the Court must determine whether "a line must be drawn beyond which a prosecutor's control over a cooperative grand jury may not extend." *United States* v. *Samango*, 607 F.2d 877, 882 (9th Cir. 1979).

To chronicle the prosecutorial misconduct in this case would require publication of almost the entire transcript of the Grand Jury proceedings. Starting with the appearance of Messrs. Thomas, Lipnick and Weitzenfeld before the Grand Jury through the testimony of the SEARS employees and culminating in the appearance of John J. Nevin, Chairman of the Board of Zenith Radio Corporation, Mr. Gorman unveiled his own personal hostility with increasing comments amounting to unsworn testimony and misstatements of the law.[18]

Grand Jury proceedings and protect Grand Jurors from unfair prosecutorial conduct.

[18] Mr. Gorman's questioning of Agent Wetzel sums up the hostility and overwhelming desire for return of an indictment.

> Q: Agent Wetzel, getting about ready to wind it up, do you have a conclusion or a statement you would like to make regarding your investigation and the conclusions drawn by yourself and the agents of the U.S. Treasury regarding this case?
>
> A: Well, in my opinion this is probably one of the major fraud cases ever found by customs, not only the method that was used and the—they even—Sears even gave a name to this. They called it a cover mode operation.
>
> Q: Would you say that constituted a scheme on their part?

John J. Nevin was brought to the Grand Jury on September 11, 1979 "as a complaining witness, so to speak, for the American television industry" (Grand Jury Transcript, John J. Nevin, September 11, 1979 p. 21). His appearance, at least according to an affidavit filed by Mr. Gorman, was without having been first interviewed by Mr. Gorman or Mr. Gorman being advised of the nature of his testimony.[19] In the contrasting atmosphere to the SEARS employees, Mr. Nevin was introduced with "everybody here is friends" (Grand Jury Transcript John J. Nevin, supra, p. 66). Mr. Nevin, punctuated with remarks by Mr. Gorman,[20] proceeded to bring home to the Grand Jurors the devastating effects that Japanese industry has had on our American economy. Lest the Grand Jurors not be sufficiently impressed with Mr. Nevin's complaint Mr. Gorman, poignantly reminds the Grand Jurors:

> "Now if a company comes in and precludes that American company from making a profit by losing money and, I

A: Very much a scheme.

Q: A concerted effort?

A: A concerted effort, and the delay that we have encountered in trying to conduct this investigation without good subpoena powers has delayed us. We have no idea at this time of how immense this violation is.

[19] It seems incredible to this Court that any lawyer, particularly one charged with the sensitive responsibility of presentation of matters to a grand jury, would present a witness without interviewing a witness to gain full knowledge of what evidence the witness can contribute to the indictment process.

[20] Mr. Gorman not only acted as the foil for Mr. Nevin's—save American industry speech—he engaged in a preliminary discourse with the Grand Jury where he improperly presented his own unsworm testimony as to facts and events far beyond the subject matter of the investigation, improperly mischaracterizing the previous testimony of witnesses (SEARS employees) who had appeared before the Grand Jury and incorrectly counseled the Grand Jury on the applicable law, including misstating the elements of the offenses under investigation.

think, from the evidence we have taken here so far the Japanese manufacturers probably sold most of these at a cost or below cost basis—

Q: Would that be correct in your eyes?

A: Yes sir.

MR. GORMAN: If that is so, may they come in here and act in concert with an American manufacturer or American retailer rather, such as Sears, which is in business to make a profit and allow them to undercut an American manufacturer by several hundred dollars or by even one hundred dollars. The only way they can do that is in violation of the law."

(Grand Jury Transcript, John J. Nevin, supra pp. 43-44).

Did the 85 pages of the same sort of discussion packaged in patriotic fervor by both Mr. Nevin and Mr. Gorman[21] affect the Grand Jury? Post hoc judgments are at best difficult but the effects here are clearly apparent when a Grand Juror asks:

"A JUROR: I'm just curious. If this dumping hadn't taken place and the American T.V. companies were allowed to compete in a normal way would Zenith television sets cost the same now or less?"

(Grand Jury Transcript, John J. Nevin, supra p. 66).

The Grand Jury—not the prosecutor—is charged with deciding probable cause to indict. It is clear from the Nevin transcript that Mr. Gorman usurped that function by asserting

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[21] During the discussions the participants opined how American companies—Sylvania, Magnavox, North American Rockwell and Motorola, "it made police radios"—have all been run out of business by Japanese imports, connected the oil crisis in the United States to the importation of television receivers from Japan, the rising price of children's clothes caused by Japanese competition, the loss of 64,000 American jobs as the result of bankruptcy of American companies and likened the alleged crimes of SEARS to rape, kidnapping, bank robbery, illicit drugs and hijacking.

to the Grand Jury *his personal belief* buttressed by Nevin's irrelevant ramblings that SEARS was guilty.

Dismissal of an indictment is a serious and drastic penalty. No Court undertakes the prospect lightly. But when the conduct of a prosecutor before the Grand Jury so seriously undermines the independence and objectivity of this Constitutional institution that it impinges upon Constitutional due process the Court must intervene in the only way it can to protect a defendant's rights and assure that such conduct will not be repeated. It cannot stand idly by and watch an important American institution misused or permit conduct which can lead to a total abrogation of the Fifth Amendment right to a Grand Jury indictment. *United States* v. *Samango*, 607 F.2d 877 (9th Cir. 1979); *United States* v. *Whitted*, 325 F.Supp. 520 (D.Neb.1971), rev'd on other grounds 454 F.2d 642 (8th Cir. 1972).

Blind zeal in the prosecution of any criminal defendant, no matter how well intentioned by the prosecutor and no matter what the personal opinion of the prosecutor of the heinous nature of the alleged crime being investigated cannot be tolerated in an ordered society. Nor can misguided high purpose justify unfairness in using what was designed to be an independent arbiter between a citizen and his or her government. Unfairness is anathema to the dispensation of justice and I can be no part of the totality of a Grand Jury proceeding that I can only characterize as unfair.

The prosecutor's conduct upon complete review of the Grand Jury transcripts is reminiscent of antics which were condemned over 70 years ago in *United States* v. *Wells*, 163 F. 313 (D. Idaho 1908). Then, as now, the remedy for this extreme misconduct can only be dismissal of the indictment.

The indictment is dismissed.[22]

There is further reason for dismissal of Counts 2, 3, 4, 5 and 6 of the indictment. The indictment was returned February 26, 1980. The acts charged in Counts 2, 3, 4, 5 and 6 were committed during 1974 or more than the five year statute of limitation provided in 18 U.S.C. § 3282.[23]

The government claims waiver of the statute of limitations by reason of a letter signed by counsel for SEARS. No authority is shown for the act of counsel. Counsel cannot waive a

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[22] The Grand Jury Transcript of June 29, 1978 leaves the Court with an uneasy feeling beyond what is clearly identifiable as misconduct. When Mr. Gorman is quoted as saying:

> "I have given you off the record a brief overview, and you had an opportunity to ask some questions. Are there anymore now before I bring the agent in?"
>
> Grand Jury Transcript, June 29, 1978, p. 2.

If this overview was anything like the ones transcribed the effects can never be known.

[23] The testimony of Albert C. Wetzel on February 26, 1980 clearly shows that the government took the position that the Statute of Limitations had run on the Sanyo transactions alleged as overt acts in the conspiracy count. (Cts 2-6).

> Q: All right. In terms of violations for Sanyo, did you find that any entries were within the five-year statute of limitations?
>
> A: No sir.
>
> Q: Did you find any conspiratorial overt acts within the five-year statute of limitations?
>
> A: No sir.
>
> Grand Jury Transcript, Albert C. Wetzel, February 26, 1980, pp. 35-36.

Why these transactions were presented for indictment on the conspiracy, as well as substantive, counts is curious. What can best be adduced from the evidence is the existence of two separate conspiracies—one on the Sanyo transactions—one on the Toshiba transactions. If this were a football game it would be termed "piling on."

constitutional or statutory right for a client. The client must waive. The government furnished the Court with a resolution from the Board of Directors authorizing Lloyd S. McClelland, Vice President and Secretary of SEARS who signed the so-called waiver to

> ". . . institute, prosecute and defend litigation, on behalf of the Company, in all courts and before all administrative agencies; and to take any actions and do anything incidental thereto that he may deem proper including, but not in limitation of the foregoing, the authority to appoint attorneys and execute pleadings, affidavits, substitutions of attorney, releases and satisfactions of judgment."

Nowhere in that resolution is there an authority of waiver of SEARS' rights—particularly of a statutory right in a criminal prosecution. A waiver must be made by the client, voluntarily and understandingly with full knowledge of the right waived.

Counts 2, 3, 4, 5 and 6 of the indictment are dismissed.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 81-1420
D.C. No. CR 80-183 MLR

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

v.

SEARS, ROEBUCK AND COMPANY, INC.,
Defendant-Appellee.

OPINION

Appeal From The United States District Court
For The Central District Of California
Manuel L. Real, U.S. District Judge, Presiding
Argued and Submitted December 11, 1981

Before: SCHROEDER, CANBY and NORRIS, Circuit Judges

NORRIS, Circuit Judge:

The district court dismissed an indictment charging Sears, Roebuck and Company, Inc. (Sears) with customs fraud because of prosecutorial misconduct in presenting the case to the grand jury. We reverse and remand.

I

On February 26, 1980, a grand jury returned an indictment against Sears alleging that Sears had conspired to defraud the United States government by overstating to customs agents the price it had paid for television receivers purchased from Japanese manufacturers. *See* 18 U.S.C. §§ 371 and 542 (1976). The indictment charged that customs documents filed by Sears failed to disclose rebates and credits that Sears had privately arranged with its Japanese suppliers, thus misrepresenting

the net price Sears had paid for the merchandise. Evidence presented to the grand jury consisted primarily of testimony by Sears employees and documents from Sears' files. The evidence indicated two possible motives for Sears' alleged overstatement of the prices it had paid: first, to bring the declared prices into conformity with the floor or "check prices" established by Japan's Ministry of International Trade and Industry (MITI); and second, to avoid dumping duties for selling imported merchandise in the United States at less than fair value.

The indictment was returned following a long, complex grand jury investigation that began in June 1978. Twenty witnesses testified over the course of thirteen grand jury sessions. Because the indictment alleged that members of the company had conspired with Japanese manufacturers, seventeen of those twenty witnesses were Sears employees or representatives. In fact, only three were not: two were Customs agents and one, John Nevin, was Chairman of the Board of Zenith Radio Corporation.

Sears moved to dismiss the indictment on grounds of prosecutorial misconduct in the treatment of witnesses and the presentation of evidence. After a hearing, Judge Kelleher denied the motion. After Sears' unsuccessful interlocutory appeal, *see United States* v. *Sears, Roebuck & Co.*, 647 F.2d 902 (9th Cir. 1981), the case was transferred to Judge Real, who held that the prosecutor had abused the grand jury process, and granted Sears' renewed motion to dismiss.[1] *United States* v. *Sears, Roebuck & Co.*, 518 F. Supp. 179 (C.D. Cal. 1981). The government appeals.

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[1] Because Judge Kelleher apparently did not have access to the transcript of Mr. Nevin's testimony when he denied Sears' motion to dismiss, his initial ruling did not preclude Judge Real's reconsideration of the motion.

II

In dismissing the indictment, Judge Real relied upon five separate examples of prosecutorial abuse of the grand jury process. He found that the prosecutor had: (1) failed to control the testimony of John Nevin, thus permitting him to make inflammatory and potentially prejudicial statements, 518 F. Supp. at 189; (2) expressed his personal views by commenting on the evidence, *id.* at 188, 189; (3) examined the Sears employees and lawyers called as witnesses with excessive hostility, *id.* at 185-87; (4) failed to offer allegedly exculpatory evidence necessary to permit the grand jury to make an informed judgment about Sears' intent to defraud the United States government, *id.* at 187 n.15; and (5) issued forthwith subpoenas in violation of the *United States Attorneys' Manual*, *id.* at 182-85.

Judge Real viewed John Nevin's testimony as the "culmina-t[ion]" of the prosecutor's abuse of the grand jury process. 518 F. Supp. at 188. Nevin, Chairman of the Board of Zenith Radio Corporation, a domestic manufacturter of television receivers and a competitor of Sears, testified, "as a complaining witness so to speak, for the American television industry." Grand Jury Transcript, Testimony of John J. Nevin at 21 (September 11, 1979). His 85 pages of testimony were, in the words of the trial judge, "packaged in patriotic fervor by both Mr. Nevin and [the prosecutor]." 518 F. Supp. at 189. Judge Real found that the prosecutor's conduct in presenting Nevin's testimony, including the prosecutor's expression of his own views on Nevin's remarks, precluded the grand jury from making an impartial determination of probable cause.

Judge Real was understandably troubled by Nevin's testimony. The prosecutor allowed Nevin to range far afield and to discourse with patriotic rhetoric on the quality of American workmanship and the devastating effect of Japanese products

on the American economy.[2] More disturbingly, the prosecutor made no effort to control the testimony,[3] instead punctuating Nevin's observations with his own thoughts on the profit mo-

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[2] For example, Mr. Nevin testified that:

> [t]here is no work force anywhere in the world that is more productive than the men and women working in American manufacturing plants, and we are slandering them every day that goes by. We are telling them they are a bunch of lazy no goods and all that, and it is just not valid. . . .
>
> Unless you give to the Japanese television market this closed Japanese market where he can make a killing at $500 a set, then he can't afford to go into the American market at $300 a set. In order to prevent what I regard to be a price fix in Japan — and I have got to tell you that if there is not a price fix there, you would think it would have occurred to somebody over there to cut the price $50 in Japan to get more business instead of cutting it $200 to get into the United States for more business. . . . [A]nd it is my point of view that the reason for the bankruptcies and the reason for the miserable profits in the American television industry is this simple: That for 10 years the Japanese manufacturer has been able to get roughly $500 . . . for half of his [production] where there was no competition from American companies and then he sold the other half of his production over here for $300, and he averaged [$]400.

Grand Jury Transcript, Testimony of John J. Nevin at 30, 33-34 (Sept. 11, 1979).

[3] We cannot accept the government's argument, *see United States* v. *Sears, Roebuck & Co.*, 518 F. Supp. 179, 189 (C.D. Cal. 1981) (citing government affidavit), that the prosecutor's failure to control Nevin can be excused by his failure to interview him before he testified. The prosecutor has a responsibility to deal with the grand jury in a manner that promotes the wise exercise of the grand jury's investigatory powers. *Hoffman* v. *United States*, 341 U.S. 479, 485 (1951). That duty obligates the prosecutor, in performing his role as counsel to the grand jury, to be scrupulously fair in selecting and preparing witnesses. *Coppedge* v. *United States*, 311 F.2d 128, 132, (D.C. Cir. 1962) ("public officers are charged with a high duty to screen out unreliable witnesses"), *cert. denied*, 373 U.S. 946 (1963).

tive and the American system of government.[4] In large part, both Nevin's testimony and the prosecutor's comments were irrelevant to any customs violations by Sears; more importantly, they were at times inflammatory and potentially prejudicial to Sears.

The prosecutor's encouragement of John Nevin was not the only example of his excessive zeal in pursuing the Sears indictment. Judge Real also found that the prosecutor had engaged in a running commentary on the evidence and witnesses, and that "the statements of [the prosecutor] read like a scathing argument giving the personal opinion of a prosecutor on the credibility of a witness that would not withstand attack for misconduct if made to a petit jury during trial." 518 F. Supp. at 185-86. In making this finding, the trial judge pointed to the prosecutor's remark that "I do not want to influence you. . . . But to me, anyway, and if anybody in the Grand Jury thinks it is different it defies logic in that scenario—he testified to the

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[4] For example, the prosecutor "put in perspective some of the things that Mr. Nevin has said," as follows:

> I think what you have to go back and consider is that we are based, our democracy is based, on a system of government which allows us to go into business and provide a service or provide a piece of merchandise and make a profit. If that profit incentive is not there, the company, whether it be Zenith or whether it be the oil companies or whether it be Sears or anybody else, is not going to go into it. . . . My point to you is that the companies, while providing the service and providing the merchandise that we want to provide, are there to make a profit. Now if a company comes in and precludes that American company from making a profit by losing money and, I would think, from the evidence we have taken in here so far that the Japanese manufacturers probably sold most of these at a cost or below cost basis . . . [i]f that is so, may they come in here and act in concert with an American manufacturer or American retailer rather, such as Sears, which is in business to make a profit and allow them to undercut an American manufacturer by several hundred dollars or by even one hundred dollars. The only way they can do that is in violation of the law.

Grand Jury Transcript, Testimony of John J. Nevin at 42-44 (Sept. 11, 1979).

fact that he knew they were getting that entire overbilling back," *id.* at 186 n.11, and to other "comments amounting to unsworn testimony and misstatements of the law." *Id.* at 188.

Judge Real identified several other instances of improper behavior to support his finding that prosecutorial misconduct permeated the entire grand jury proceeding. He found that the prosecutor had impermissibly harrassed the Sears employees called as witnesses: "[the prosecutor's] incessant commands . . . ordering SEARS employees to respond "yes" or "no" to complex, unintelligible and argumentative questions girded with his sarcastic remarks was calculated to and did deprive the Grand Jury of its ability to fairly view the testimony of SEARS employees." 518 F. Supp. at 187-88. He had already determined that the issuance of forthwith subpoenas to Sears attorneys violated Department of Justice policy[5] and "define[d] at the outset the overreaching of the government in its presentation to the Grand Jury." 518 F. Supp. at 185. He had also faulted the government for misrepresenting to the grand jury Sears' willingness to comply with the subpoenas duces tecum issued to it, *id.* at 182, and for failing to introduce the deposition of Sears' attorney John Rehm. *Id.* at 187. Rehm's deposition contained allegedly exculpatory statements that Sears did not have the requisite intent to violate the customs laws by falsifying its customs documents because it had formulated its rebate programs on the advice of counsel. Sears here supple-

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[5] The court cited Section 9-11.230 of the *United States Attorneys' Manual*, entitled "Limitations on the Grand Jury Subpoena," which provides:

> "All Grand Jury witnesses should be accorded reasonable advance notice of their appearance before the Grand Jury. '[F]orthwith' . . . subpoenas should be used only when swift action is important . . . Considerations among others, which bear upon the desirability of using such subpoenas include . . . (1) the risk of flight; (2) the risk of destruction or fabrication of evidence; (3) the need for the orderly presentation of evidence; and (4) the degree of inconvenience to the witness."

518 F. Supp. at 184 n.9.

ments those findings with claims that the prosecutor withheld additional information "vital to the grand jury's informed and independent judgment," *United States* v. *DeMarco*, 401 F. Supp. 505, 514 (C.D. Cal. 1975), *aff'd*, 550 F.2d 1224 (9th Cir.), *cert. denied*, 434 U.S. 827 (1977), on the issue whether Sears did in fact report the rebate arrangements to Customs Service officials.

We agree with Judge Real that the prosecutor's behavior before the grand jury was at times abusive, and stress that we cannot condone such excessive prosecutorial zeal. In determining whether such misconduct warrants dismissal of the indictment, however, we must bear in mind that the judicial power to intervene in grand jury proceedings is "frequently discussed, but rarely invoked." *United States* v. *Samango*, 607 F.2d 877, 881 (9th Cir. 1979). Because the constitutional doctrine of separation of powers mandates judicial respect for the independence both of the grand jury, *United States* v. *Chanen*, 549 F.2d 1306, 1312 (9th Cir.), *cert. denied*, 434 U.S. 825 (1977), and of the prosecutor, *id.*; *see also United States* v. *Gonsalves*, 691 F.2d 1310, 1318-19 (9th Cir. 1982), an indictment may be dismissed only in "flagrant case[s]" of prosecutorial misconduct. *United States* v. *Kennedy*, 564 F.2d 1329, 1338 (9th Cir. 1977).[5]

With this admonition in mind, we proceed to a consideration of Judge Real's dismissal of the Sears indictment.

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[5] Reviewing courts have not always clearly articulated their rationale for determining when prosecutorial misconduct is so flagrant that dismissal of an indictment is warranted. Our court, for example, has suggested that indictments may be dismissed on supervisory power grounds only when there is a "clear basis in fact and law" for judicial intervention into the grand jury process. *United States* v. *Chanen*, 549 F.2d 1306, 1313 (9th Cir.), *cert. denied*, 434 U.S. 825 (1977). We confess this standard is so vague and conclusory that it fails to illuminate the applicable legal principles, and provides district judges who are called upon to apply it precious little guidance.

III

A

The grand jury clause of the Fifth Amendment provides that "[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury."[7] Implicit in that language is the guarantee that a

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[7] Although the constitutional concept of "fundamental fairness" has sometimes been analyzed as an aspect of due process, *see, e.g., United States* v. *Basurto*, 497 F.2d 781, 785 (9th Cir. 1974), it accords both with prevailing precedent and with the language of the Constitution to treat the right to unbiased treatment by a grand jury as one grounded in the grand jury clause of the Fifth Amendment. Both because the grand jury's determination is a preliminary one, and because the full panoply of constitutional protections will be available at trial, courts have been disinclined to extend the due process rights to grand jury proceedings. *See, e.g., United States* v. *Calandra*, 414 U.S. 338, 349 (1974) ("Because the grand jury does not finally adjudicate guilt or innocence, it has traditionally been allowed to pursue its investigative and accusatorial functions unimpeded by the evidentiary and procedural restrictions applicable to a criminal trial"); *Silverthorne* v. *United States*, 400 F.2d 627, 634 (9th Cir. 1968), *cert. denied*, 400 U.S. 1022 (1971) ("If a grand jury is prejudiced by outside sources when in fact there is insufficient evidence to indict, the greatest safeguard to the liberty of the accused is the petit jury and the rules governing its determination of a defendant's guilt or innocense"). Thus, the constitutional grounds for dismissal are limited. It is settled law, for instance, that an indictment may be based upon hearsay testimony, *United States* v. *Trass*, 644 F.2d 791 (9th Cir. 1981), that the prosecutor is not required to present all available exculpatory evidence, *Loraine* v. *United States*, 396 F.2d 335, 339 (9th Cir.), *cert. denied*, 393 U.S. 933 (1968), and that evidence may be used even if obtained in violation of the exclusionary rule, *United States* v. *Calandra*, 414 U.S. 338 (1974). An accused's only cognizable interest in grand jury proceedings, therefore — the only interest that courts can vindicate by dismissing indictments on constitutional grounds — is to have a legally constituted grand jury make an informed and independent evaluation of the evidence to determine if there is probable cause to believe him guilty of a crime. *United States* v. *Cederquist*, 641 F.2d 1347, 1352 (9th Cir. 1981).

defendant will be indicted only upon the informed and independent determination of a legally constituted grand jury. *See, e.g., Stirone* v. *United States*, 361 U.S. 212, 218-19 (1960) ("The very purpose of the requirement that a man be indicted by grand jury is to limit his jeopardy to offenses charged by a group of his fellow citizens acting independently of either prosecuting attorney or judge. . . . The right to have the grand jury make the charge on its own judgment is a substantial right which cannot be taken away with or without court amendment"). Dismissal of an indictment is therefore warranted on constitutional grounds if prosecutorial misconduct has undermined the grand jury's ability to make an informed and objective evaluation of the evidence presented to it. *See, e.g., United States* v. *Cederquist*, 641 F.2d 1347, 1353 (9th Cir. 1981) ("It must be shown that the prosecutor's conduct significantly infringed upon the ability of the grand jury to exercise its independent judgment"). The relevant inquiry therefore focuses not on the degree of culpability of the prosecutor, but on the impact of his misconduct on the grand jury's impartiality. *See, e.g., United States* v. *Polizzi*, 500 F.2d 856, 887-88 (9th Cir. 1974), *cert. denied*, 419 U.S. 1120 (1975) (defendant [must demonstrate] "a reasonable inference of bias on the part of the grand jury resulting from the comments of the prosecutor [referring to the defendants' alleged association with the Mafia]").

B

Upon review of the transcript of the grand jury proceedings, we hold that Sears has failed to demonstrate the prejudice necessary to justify dismissal of the indictment against it on constitutional grounds.* Judge Real found that the prosecu-

* Because we hold that the prosecutor's misconduct did not undermine the independence of the grand jury, it is unnecessary for us to reach the question, alluded to in *United States* v. *Armoured Transport*, 629 F.2d 1313, 1320 (9th Cir. 1980), *cert. denied*, 450 U.S. 965 (1981), whether Sears, as a corporation, may claim the same level of constitutional protection as an individual defendant.

tor's misconduct before the grand jury violated Sears' constitutional rights, concluding that

> when the conduct of a prosecutor before the Grand Jury so seriously undermines the independence and objectivity of this Constitutional institution that it impinges upon Constitutional due process the Court must intervene in the only way it can to protect a defendant's rights and assure that such conduct will not be repeated. It cannot stand idly by and watch an important American institution misused or permit conduct which can lead to a total abrogation of the Fifth Amendment right to a Grand Jury indictment.

518 F. Supp. at 190 (citation omitted).[9] Although it is undeniable that the prosecutor abused his prerogatives in conducting this grand jury investigation—and we stress again that we are dismayed by the tactics he employed—Sears simply has not shown, as required, that the grand jury's independence was so undermined that it could not make an informed and unbiased determination of probable cause.

In assessing the impact of John Nevin's patriotic fervor on the grand jury's impartiality, we must take into account the prosecutor's admonitions to the grand jury that Nevin, as a Sears competitor who complained that he had been victimized by Sears' alleged conspiracy, might be biased. Such warnings, while eminently appropriate, are not required, *United States* v. *Thompson*, 576 F.2d 784 (9th Cir. 1978) (grand jury need not be informed of evidence bearing on the credibility of witnesses), and undoubtedly tended to neutralize the effect of Nevin's testimony. Further, Nevin was the fifteenth of twenty witnesses to testify over a period of eighteen months, and his testimony lasted only one day. The facts of this case are therefore

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[9] We review *de novo* Judge Real's legal conclusion that Sears' Fifth Amendment rights were violated. We are not here engaging in a traditional factfinding function, but are making a value judgment from written grand jury transcripts whether the prosecutor's misconduct so biased the grand jury that dismissal of the indictment is warranted.

more comparable to those presented in *Coppedge* v. *United States*, 311 F.2d 128, 131 (D.C. Cir. 1962) *cert. denied*, 373 U.S. 946 (1963) (even assuming testimony of one witness was perjured, dismissal of indictment was not warranted where record showed that grand jury had heard other competent testimony) and *United States* v. *Bracy*, 566 F.2d 649, 654 (9th Cir. 1977), *cert. denied*, 439 U.S. 818 (1978) (grand jurors were aware that witness had perjured himself, and his testimony was not material to grand jury's consideration) than to those in *United States* v. *Basurto*, 497 F.2d 781 (9th Cir. 1974), in which the indictment was dismissed because the prosecutor failed to notify the court and the grand jury that one of only two government witnesses had perjured himself on material facts before the grand jury.

Questions posed by the jurors confirm that they retained a critical perspective on Nevin's testimony. Although Nevin had testified that low-priced imports could adversely affect American television manufacturers and the jobs of American workers, *see* 518 F. Supp. at 189, jurors volunteered questions and comments clearly indicating that they understood the tradeoff: that lower-priced imports could also benefit American consumers who would be charged lower prices for television receivers.[10] The grand jury thus seemed to have retained the objectivity necessary to evaluate Nevin's testimony fairly. In sum, while we deplore the prosecutor's conduct in failing to exercise greater control over Nevin and in punctuating Nevin's testimony with expressions of his own views, we do

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[10] "A JUROR: I'm just curious. If this dumping hadn't taken place and the American T.V. companies were allowed to compete in a normal way, would Zenith television sets cost the same now or less?"

Grand Jury Transcript, Testimony of John J. Nevin at 66 (September 11, 1979). We disagree with the district judge, 518 F. Supp. at 189, that this question indicates that the jurors were biased by Nevin's testimony; to the contrary, we view the question as reflecting grand jury sophistication about the consumer benefits of competition.

not believe that the Nevin appearance significantly impaired the ability of the grand jury to make an informed and impartial determination of probable cause to indict.

Nor did any other of the prosecutor's actions undermine the grand jury's ability adequately to perform its constitutional function. Although the district court faulted the prosecutor for expressing his personal belief in Sears' guilt, that does not justify dismissal in this case. *United States* v. *Cederquist*, 641 F.2d at 1353 (grand jurors are aware that prosecutor believes indictment is warranted). Nothing in the record suggests that the prosecutor forced his views on the jurors or otherwise coerced them to return an indictment. On the contrary, the prosecutor repeatedly advised the jurors that he spoke with two voices and that, although he personally believed the evidence established probable cause, the jury was free to disregard his opinion.[11] *Compare United States* v. *Wells*, 163 F. 313 (D. Idaho 1908) (dismissing indictment where prosecutor told grand jury it had duty to indict, entered jury room during deliberations, and refused to leave on request).

Nothing in the record indicates, furthermore, that the prosecutor's conduct in examining Sears employees undermined the independence of the grand jury. Although the prosecutor was overly aggressive in his examination of several of the Sears employees, particularly Mr. Flummerfelt and Mr. Allen,

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[11] For example, the prosecutor advised the jurors:

> [M]y statements in terms of evidence count for absolutely nothing. My opinion in terms of evidence before this grand jury counts for absolutely nothing. Do not take my opinion, my statements, whatever you interpret them to be, as any evidence in this case. Do not decide whether there is probable cause to indict the Sears, Roebuck Company based on my opinion, base it on the evidence that you have read in the form of the documents that we have presented to you in the past and by the witnesses that have been produced before you.

Grand Jury Transcript, Testimony of Albert C. Wetzel at 3 (Feb. 26, 1980).

he did not engage in "brutal, badgering questioning of the defendant's witnesses,"[12] *Chanen*, 549 F.2d at 1310.

In commenting to the jury after testimony by the Sears employees, furthermore, the prosecutor was acting properly within his role "to furnish guidance to the grand jury on the law and the weight of the evidence," ABA Project on Standards for Criminal Justice, The Prosecution Function and the Defense Function § 3.5 at 88 (1970). The record shows that the prosecutor's explanations were frequently given in response to jurors' questions, *see, e.g.*, 518 F. Supp. at 185 n. 10, and that, although the prosecutor made plain to the jurors his view of the credibility of Sears employees, he carefully pointed out that the jurors might interpret the evidence differently. 518 F. Supp. at 186 n. 11. Thus, although we would prefer that a prosecutor maintain a less aggressive posture when questioning witnesses, we cannot conclude that the prosecutor's treatment of Sears' employees undermined the grand jury's ability to exercise independent judgment on the question of probable cause to indict.

Finally, we disagree with Judge Real's ruling, 518 F. Supp. at 187 & n.15, that the grand jury could not have returned an informed indictment because the prosecutor failed to introduce a deposition containing allegedly exculpatory evidence.[13] It is well settled that the prosecutor is "not required to present the grand jury with evidence which would tend to negate guilt." *United States* v. *Lasky*, 600 F.2d 765, 768 (9th Cir.), *cert. denied*, 444 U.S. 979 (1979). The grand jury does not weigh the

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[12] The statements of the witnesses themselves indicate that they did not feel abused. After examination, the prosecutor asked each witness if he or she had been treated fairly; each responded affirmatively. Even Mr. Flummerfelt, whom the district judge felt had been particularly abused, responded: "I believe so it is the normal process of a prosecuting attorney and one who is testifying. You have your interpretations and I have mine." Grand Jury Testimony of James K. Flummerfelt at 110-11 (Oct. 24, 1979).

[13] Sears devoted much of its appellate brief to a discussion of presumably exculpatory evidence which the prosecutor did not pre-

guilt or innocence of the accused but acts only to make a preliminary determination whether there is probable cause to believe him guilty of a crime. *United States* v. *Cederquist*, 641 F.2d 1347, 1352 (9th Cir. 1981).

We hold, therefore, that the prosecutor's misconduct in this case did not subvert the Fifth Amendment mandate that an indictment be returned by an informed and independent grand jury. The case is remanded to the district court for proceedings consistent with this opinion.

REVERSED AND REMANDED.[14]

---

sent to the grand jury. That effort is misdirected at this stage of the litigation.

[14] A majority of the panel has voted to instruct the district court to reinstate the indictment for trial. Because Judge Norris believes that the district court should be given an opportunity to exercise its discretion to dismiss the indictment on supervisory power grounds, he writes separately on this point. *See* discussion *infra*.

NORRIS, Circuit Judge, dissenting in part from the judgment.

Although I agree that Judge Real's dismissal of the Sears indictment should be reversed, I write separately because I would, unlike the majority, expressly leave open on remand the question whether the district court may exercise its discretion to dismiss the indictment on supervisory power grounds. I believe the majority's willingness to rely solely on a constitutional rationale in reviewing the dismissal of the indictment obscures the crucial analytical distinction between that rationale and an alternate ground for dismissing an indictment: a court's exercise of its inherent supervisory power.

That distinction has been recognized in the case law, *see, e.g., United States* v. *Chanen*, 549 F.2d 1306, 1309 (9th Cir.), *cert. denied*, 434 U.S. 825 (1977) ("these dismissals have been based either on constitutional grounds or on the court's inherent supervisory power"), but it has never, to my mind, been satisfactorily explained. In my view, while a constitutional analysis focuses on preserving fairness for the individual defendant and remedying any harm that has been done to his basic rights, the exercise of a court's inherent supervisory power serves two institutional purposes: deterring governmental misconduct and protecting the integrity of the judicial process. *See, e.g., United States* v. *Payner*, 447 U.S. 727, 736 n.8 (1980) ("the supervisory power serves the 'twofold' purpose of deterring illegality and protecting judicial integrity," although it did not justify excluding tainted evidence when "the illegal conduct did not violate the respondent's [constitutional] rights"); *United States* v. *Loud Hawk*, 628 F.2d 1139, 1158 (9th Cir. 1979) (Hufstedler, J., dissenting) (in determining whether government's destruction of evidence required dismissal of indictment, court pursued "separate and distinctive interests . . .: deterring governmental misconduct, protecting a defendant's right to a fair trial; and preserving the integrity of the judicial process"). The individual defendant thus serves only as a conduit for vindication of the public interest. As with application of the exclusionary rule, the benefit to the defendant when a court exercises its supervisory

power to dismiss an indictment is incidental to the primary goal—protection of systemic values by deterring official misconduct and preserving the appearance of fairness.

Because constitutional and supervisory power analyses serve fundamentally different purposes, application of either dictates that different factors be weighed in determining whether dismissal of an indictment is warranted. As noted in the first portion of my opinion, the dismissal of an indictment on constitutional grounds requires a finding that the prosecutor's misconduct biased the grand jury. *See supra* p. ——. Dismissal on supervisory power grounds, on the other hand, is based on a combination of different factors: the egregiousness of the prosecutor's misconduct, the need to discipline the particular prosecutor in light of any past misconduct, and the effectiveness of any available sanctions that are less drastic than dismissal of the indictment.

Although the Supreme Court has recently indicated that prejudice to an accused resulting from prosecutorial misconduct at trial should also be considered as part of a supervisory power analysis, *United States* v. *Hasting*, 51 U.S.L.W. 4572 (U.S. May 23, 1983) (court of appeals could not reverse conviction by exercise of supervisory power without considering whether prosecutor's error was harmless), I do not read *Hasting* as establishing a *per se* rule against the exercise of supervisory power in the absence of prejudice to the defendant. *Hasting*, 51 U.S.L.W. at 4579 (Brennan, J., concurring in part and dissenting in part). No case has held, furthermore, that a defendant must show that a grand jury is biased before an indictment may be dismissed pretrial on supervisory power grounds.[1] In fact, this court has dismissed an indictment based

[1] Because *Hasting* involved a reversal of a conviction after a jury trial, the Court was concerned about reversing the conviction as a sanction for prosecutorial misconduct which the Court found to be harmless when to do so would put everyone involved, especially the victims, through the ordeal of retrial. That is not a concern when, as here, the trial has not yet occurred.

on its concern for the administrative manageability of a trial without making any reference at all to the interests of the accused. *United States* v. *Gonsalves*, 691 F.2d 1310 (9th Cir. 1982) (complex RICO indictment dismissed because trial based on it would have been administratively unmanageable).

For these reasons, I would remand the case to the district court without prejudice to Sears' right to renew its motion to dismiss the indictment on supervisory power grounds.[2]

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[2] Because the exercise of supervisory power involves a large measure of discretion, the decision to invoke it should be made in the first instance by the trial judge and reviewed on appeal only for abuse of discretion. *See, e.g., Sigliano* v. *Mendoza*, 642 F.2d 309, 310 (9th Cir. 1981); *cf. United States* v. *Rodgers*, 51 U.S.L.W. 4621, 4631 (U.S. May 31, 1983) ("the task of exercising equitable discretion should be left to the district court in the first instance").

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 81-1420
D.C. No. CR 80-183-R

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

v.

SEARS, ROEBUCK AND COMPANY, INC.,
Defendant-Appellee.

FILED
NOV 16 1983
Phillip B. Winberry
Clerk, U.S. Court of Appeals

ORDER

Before: SCHROEDER, CANBY, NORRIS, Circuit Judges

The panel as constituted above has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied, and the suggestion for rehearing en banc is rejected.

SUBSIDIARIES AND AFFILIATES OF SEARS, ROEBUCK AND CO.[1]

WHOLLY OWNED AND MAJORITY OWNED COMPANIES

AEMC Transferee Corp.
Allstate Automobile and Fire Insurance Company Limited (Japan)
Allstate Development Corporation
Allstate Enterprises, Inc.
Allstate Enterprises Consumer Discount Company
Allstate Enterprises Financial Corporation
Allstate Enterprises Financial Corporation of Iowa
Allstate Enterprises Financial Corporation of Tennessee
Allstate Enterprises Holdings, Inc.
Allstate Enterprises Management Company
Allstate Enterprises Mortgage Corporation
Allstate Indemnity Company
Allstate Insurance Company
Allstate Insurance Company Limited (United Kingdom)
Allstate Insurance Company of Canada
Allstate Insurance Holdings Limited (United Kingdom)
Allstate International Inc.
Allstate International S.A. (Switzerland)
Allstate Investment Management Company
Allstate Life Insurance Company
Allstate Life Insurance Company of Canada
Allstate Motor Club, Inc. (California)
Allstate Motor Club, Inc. (Delaware)
Allstate Reinsurance Company (Belgium)
Allstate Reinsurance Co. Limited (United Kingdom)
Allstate Savings and Loan Association
Allstate Service Stations, Ltd. (Canada)
Allstate Trading Company
Banco de Credito Internacional, S.A. (Panama)
Barrington Insurance Company Limited (Bermuda)

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[1] This list identifies subsidiaries and affiliates as of August 31, 1983. No more current list is presently available.

Barton and Ludwig Insurance Agency, Inc.
Barton and Ludwig Mortgage Corporation
Barton and Ludwig Property Management, Inc.
Bay Mart Assoc.
Berg Nationwide Referral Company
Cameron Leasing Corporation
Capitol Service Corporation
Career Academy of Real Estate, Inc.
Carousel Center, Inc.
Carousel Management Co. (CMO)
Carousel Tavern, Inc.
CB Funding Corporation
City Place Leasing Corporation
Civic Center Leasing Corporation
Clary Oaksmith-Carlson, Inc.
Coldwell, Banker & Company
Coldwell, Banker & Company Real Estate and Insurance Brokers
Coldwell Banker Commercial Group, Inc. (CBCGI)
Coldwell Banker Commercial Real Estate Services, Inc.
Coldwell Banker Ed Post, Inc.
Coldwell Banker Employees Investment, Corp.
Coldwell Banker Escrow Services, Inc.
Coldwell Banker Home Rental, Inc.
Coldwell Banker, Inc.
Coldwell Banker Insurance Brokers
Coldwell Banker Insurance Services, Inc.
Coldwell Banker Insurance Services of Kansas City
Coldwell Banker Insurance Services of San Francisco, Inc.
Coldwell Banker Insurance Services of Virginia, Inc.
Coldwell Banker Michael J. Lipsay, Inc.
Coldwell Banker Real Estate 10, Inc.
Coldwell Banker Real Estate Group, Inc.
Coldwell Banker Real Estate Management Services, Inc.
Coldwell Banker Real Estate Trust Services
Coldwell Banker Relocation Management Services, Inc. (formerly Execurrans, Inc.)

Coldwell Banker Residential Affiliates, Inc.
Coldwell Banker Residential Affiliates of New York, Inc.
Coldwell Banker Residential Brokerage Company, d/b/a Coldwell Banker Residential Real Estate Services, Inc.
Coldwell Banker Residential Group, Inc.
Coldwell Banker Residential Mortgage Company
Coldwell Banker Residential Real Estate Services
Coldwell Banker Residential Real Estate Services
Coldwell Banker Residential Real Estate Services, Inc.
Coldwell Banker Residential Real Estate Services, Inc.
Coldwell Banker Residential Real Estate Services, Inc.
Coldwell Banker Residential Real Estate Services of Georgia, Inc., d/b/a Coldwell Banker Barton and Ludwig, Inc.
Coldwell Banker Residential Real Estate Services of Illinois, Inc. (Coldwell Banker Thorsen)
Coldwell Banker Routh Robbins-Realtors, Inc.
Coldwell Banker Resort Timeshares, Inc.
Coldwell Banker Routh Robbins-Realtors, Inc.
Coldwell Banker Russell T. Baker, Inc.
Coldwell Banker Securities Corporation
Coldwell Banker Settlement and Title Services, Inc.
Coldwell Banker Residential Real Estate Services of Minnesota, Inc.
Coldwell Banker/Sunbelt, Inc.
Coldwell Banker Sutton & Towne, Inc. (CBSTI)
Coldwell Banker Title Services, Inc. (Georgia)
Coldwell Banker Title Services, Inc. (Illinois)
Coldwell Banker Title Services, Inc. (Kansas)
Columbia Escrow Company, Inc.
Contrill Realty Ltd. (Canada)
Corporate Relocation Consultants
Dean Witter Financial Services, Inc.
Dean Witter Holding Corporation
Dean Witter Leasing Corporation
Dean Witter Realty Credit Corporation
Dean Witter Realty Inc.
Dean Witter Realty Income Associates I Inc.

Dean Witter Realty Income Properties I Inc.
Dean Witter Reynolds B.V.
Dean Witter Reynolds Commodities Limited
Dean Witter Reynolds GmbH
Dean Witter Reynolds (Hong Kong) Ltd.
Dean Witter Reynolds Inc.
Dean Witter Reynolds Insurance Agency (Indiana) Inc.
Dean Witter Reynolds Insurance Agency (Massachusetts) Inc.
Dean Witter Reynolds Insurance Agency (Ohio) Inc.
Dean Witter Reynolds Insurance Agency (Oklahoma) Inc.
Dean Witter Reynolds Insurance Agency (Texas) Inc.
Dean Witter Reynolds Insurance Services (Arizona) Inc.
Dean Witter Reynolds Insurance Services (Arkansas) Inc.
Dean Witter Reynolds Insurance Services (Illinois) Inc.
Dean Witter Reynolds Insurance Services Inc.
Dean Witter Reynolds Insurance Services (Montana) Inc.
Dean Witter Reynolds Insurance Services (New Hampshire) Inc.
Dean Witter Reynolds Insurance Services (South Dakota) Inc.
Dean Witter Reynolds Insurance Services (Wyoming) Inc.
Dean Witter Reynolds International, Inc.
Dean Witter Reynolds International Incorporated
Dean Witter Reynolds International S.A.
Dean Witter Reynolds (Italy) Inc.
Dean Witter Reynolds (Laussnne) S.A.
Dean Witter Reynolds Leasing Inc.
Dean Witter Reynolds Limited
Dean Witter Reynolds Overseas Ltd.
Dean Witter Reynolds (Puerto Rico) Inc.
Dean Witter Reynolds Real Estate Company Inc.
Dean Witter Reynolds S.A. (Geneva)
Dean Witter Reynolds (S.E.A.) Pta. Ltd.
Dean Witter Reynolds S.P.A.
Dean Witter Reynolds Venture Equities Inc.
Demeter Management Corporation

Development Science Services, Inc.
DWR Special Partners
DWR TAI THREE INC.
DWRO Insurance Holdings Inc.
Executive Contractors of Georgia, Inc.
Executrans, Inc.
Executrans Canada Ltd.
Exec-Van Systems, Inc.
Fairfax Title Abstract Corporation
First Newport Mortgage Corp.
Fleet Maintenance, Inc.
F. N. Corporation
Forrest E. Olson, Inc.
Gateway Hotel, Inc.
General Underwriters Agency, Inc.
Golightly - Harbridge, Inc.
Greenbriar Mall Venture
Grey City Graphics, Inc.
Guardian Title Company
Harbridge House Inc.
Henry Broderick, Inc.
Holiday Homes International Corporation
Homart Development Co.
Kansas City Referral Network, Inc.
Kehe, Foy & Snelton, Inc.
Kenmore Restaurants, Ltd. (Canada)
Kerrybrook Development Ltd. (Canada)
Kerrytor Ltd.
Kingway Imports Ltd. (Canada)
Kro-Mar Associates Limited Partnership
Kro-Mar Incorporated

L. B. Enterprise (429348 Ontario Ltd.)
Lar-Hil, Inc.
Lee Leasing Corporation
Les Estimations Claude Vanier Inc.
Liberty Street Realty Advisors Inc.
Lifetime Foam Products, Inc.

Lincoln Benefit Life Company
Mercer Mall Company
Nationwide Relocation Services, Inc.
Newsub Co.
Northbrook Excess and Surplus Insurance Company
Northbrook Indemnity Company
Northbrook Life Insurance Company
Northbrook National Insurance Company
Northbrook Property and Casualty Insurance Company
Northbrook Underwriters Syndicate
North Shore Square Associates
Nyack Leasing Corporation
Oaksmith-Carlson, Inc.
Orlando Jetport Inn, Inc.
Pacific Installers, Inc.
P & O Financial Services, Inc.
Parchman & Oyler Company
Place Vertu Ltd.
PMI Insurance Co.
PMI Mortgage Corporation
PMI Mortgage Insurance Co.
PMI Securities Co.
Previews of Colorado, Inc.
Previews, Incorporated
Publisears S/C Ltda. (Brazil)
Quetor Realty Ltd. (Canada)
Racine Investor Services, Inc.
Ready Guarantee Corporation
Realtek Mortgage Corporation
Realtek Referrals Company
Realty Management Services, Inc.
Referral Realty, Inc.
Regbrooks Ltd.
Regional Shopping Centres Ltd. (Canada)
Regional Shopping Centres (Canada) Ltd.
Residental Realty, Inc.
Reynolds Government Securities Inc.
Reynolds Securities Inc.

Routh Robbins Real Estate, Inc.
Safe-T-Lawn, Inc.
Saltex, Inc.
Sartell Leasing Corporation
Sears Driving School, Inc.
Sears Finance Corp.
Sears International Finance Co.
Sears Investment Management Co.
Sears Overseas Finance, N. V. (Netherlands Antilles)
Sears Roebuck Acceptance Corp.
Sears, Roebuck and Co. B.V. (Netherlands)
Sears, Roebuck and Co. GmbH (Germany)
Sears, Roebuck Servicios de Chile Limitada
Sears, Roebuck S. A. (Central America)
Sears, Roebuck S. A. Comercial e Industrial (Argentina)
Sears, Roebuck S. A. Comercio Industria (Brazil)
Sears, Roebuck de Espana, S. A.
Sears, Roebuck del Peru S. A. (Peru)
Sears, Roebuck de Mexico, S. A. de C. V. (Mexico)
Sears, Roebuck de Puerto Rico, Inc.
Sears, Roebuck de Venezuela, S. A. (Venezuela)
Sears, Roebuck International, Inc.
Sears, Roebuck Limited (England)
Sears, Roebuck Overseas, Inc.
Sears, Roebuck Pty. Limited (Australia)
Sears World Trade, Inc.
Sears World Trade (Australia) Limited
Sears World Trade Commercial Ltda. (Brazil)
Sears World Trade GmbH (Germany)
Sears World Trade (Hong Kong) Limited
Sears World Trade (Japan) K.K.
Sears World Trade (Korea), Inc.
Sears World Trade (Singapore) Pte. Ltd.
Sears World Trade (Taiwan), Inc.
Sears World Trade (U.K.) Limited
Sears Securities Sales, Inc.

Simpsons-Sears Acceptance Co., Ltd. (Canada)
Simpsons-Sears Limited (Canada)
Simpsons-Sears Properties Ltd. (Canada)
St. Laurent Shopping Centre Ltd. (Canada)
Supervised Parking (Ontario) Ltd. (Canada)
Surety Equities Corporation
Surety Life Insurance Company
Surety Securities Corporation
Sutton & Towne, N.J., Inc.
Tech-Cor, Inc.
Terminal Freight Handling Co.
Thorsen Insurance Services, Inc.
Tower Ventures Inc.
Trans-Coast Services, Inc.
Trans-Executive Homesearch, Inc.
Underwriters Syndicate Management, Inc.
Universal-Rundle Corporation
URC International, Inc.
Valdosta Mall Assoc.
Valley of California, Inc.
Vantor Realty Ltd. (Canada)
Washington Business Park Associates
WBP Properties, Inc.
Wintor Realty Ltd. (Canada)
The Woodbridge Corporation

FIFTY PER CENT OWNED COMPANIES

Altamonte Mall
Cerrafour Richelieu Ltd.
Centre Commercial De L'Autoroute Ltee.
Centre Development Associates
Chatham Centre Mall Limited
Clearview Mall Co.
Coeur D'Alene Associates
Cranberry Mall Co.

Dean Witter Reynolds (Canada) Inc.
Fiesta Mall
Greenwood Mall Assoc.
Havenbrook Assoc.
Keifor Holding Ltd. (Canada)
Lake Hodges Development Co.
Lakeside Center Assoc.
Louisville Assoc.
New Park Assoc.
Novi Associates
The National Tag Company
River Valley Assoc.
Seibu Allstate Life Insurance Company, Ltd. (Japan)
Webster Assoc.
Westgate Assoc.
Woodfield Assoc.

LESS THAN FIFTY PER CENT OWNED COMPANIES

Acuna-Ropa, S. A.
A.L.P. Industries, Inc.
American Waterproofing Corporation
Arco Wheel, Inc.
Arizona Public Service Co.
Armstrong Acceptance Co., Inc.
Armstrong Rubber Company, The
Armstrong Rubber Export, Ltd.
Armstrong Rubber International, Ltd.
Ashley's The Outlet Store, Inc.
Bannister Mall Co.
Baron Data Systems
Black Hills Power & Light Co.
Brae Corporation
Bridge Park Limited
Capitol City Mall Associates
Carrefour de L'Estre Inc.
Central Illinois Public Service Co.

Central Telephone Company
Centre Commerciaux Regionaux du Quebec Ltee.
Centres Regionaux du Quebec Enrg.
Centro Comercial Plaza Satelite (Trust) (Mexico)
Centro Comercial Plaza Universidad (Trust) (Mexico)
Centro Comercial Propatria, C.A. (Venezuela)
Commerce Consolidators Corporation
Commonwealth Edison Company
Composite Container Corporation
Computer Facilities Inc.
Condelle House Ltd.
Consumers Power Company
Conver Corporation
Copolymar Rubber & Chemical Corporation
Cornwall Square Development
Cottonwood Corners Inc.
Crown Semiconductor, Inc.
Dart Transportation Service
Dart Warehouse Corporation
Dart Equipment Corporation
Delta Data Systems Corporation
Dentsply Holdings Inc.
DeSoto, Inc.
DeSoto Coatings Limited
DeSoto Freeport Warehouse
Donald Fox and Partners (Underwriting Management) Limited (U.K.)
Duquesne Light Company
Eastgate Company
Elmhurst Maintenance, Inc.
Equatorial Communications Company
Form-O-Uth, Inc.
Form-O-Uth de El Salvador, S.A. de C.V.
Fruit Belt Motor Service, Inc. (Ill).
Grimsby Stove and Furnace Ltd. (Canada)
H-L Land Development Ventur
Harold Williams (1964) Ltd.
Homan Services, Inc.

Houdeille Industries, Inc.
Hot Springs Mall Assoc.
Hurco Manufacturing Company, Inc.
IDS Holding Corporation
Industrias Vanatec, S.A. (Venezuela)
Information Centre Quebec Inc.
Inglis Co. Limited
International Communications Sciences, Inc.
Iowa Illinois Gas and Electric Co.
Ivankerry
Jackson Distribution Center, Incorporated
Japan Fine Coatings Co., Ltd.
John Rennie Ltd. (Canada)
Kansas Gas and Electric Company
Kellwood Company
Kellwood International, Inc.
Kellwood International Limited
Keltyboots, Inc.
Kelty Pack, Inc.
Kildonan Place Developments
KINT Company, Ltd.
Koala Technologies Corporation
Kusk, Inc.
KWD Export Corporation
Lafayette Assoc.
Lanx Corporation
Leaseway Warehouses, Inc.
Leger Corporation
Logisticon, Inc.
Manchester Manufacturing Inc.
Markham Market Place
Matemexico, S.A. de C.V.
Maul Technology Corp.
Metromail Corporation
MIDACA Management Corporation
Minnesota Power and Light Company
Monterey Mills, Inc.

Monterey Mills of Tennessee, Inc.
Mountain Fuel Supply Company
Neighborhood TV Company, Inc.
Newpark Plaza Assoc.
Nicor, Inc.
Nuclear Risk Insurance Ltd.
Otrona Advanced Systems Corp.
Pacific Power and Light Company
Pencept, Inc.
Pennsylvania Power & Light Company
Peoples Energy, Corp.
Photo Engravers and Electrotypers Limited (Canada)
Place Beauport Enrg.
Place Beauport Properties
Place Vertu Enrg.
Professional Data Corporation
Project 200 Properties Ltd. (Canada)
Public Service Company of Indiana Inc.
Quilted Textiles Corporation
Regional Shopping Centres Engr.
Rennie Industries, Ltd. (Canada)
Rey-Max Bra, S.A. de C.V.
Richmond Converters, Inc.
Roper Canada Limited
Roper Corporation
Roper International Sales Corp.
Sanyo Manufacturing Corporation
Sarama Lighting, Inc.
Seguros del Atlantico, S.A. (Mexico)
Seragen, Inc.
Signal Delivery Service, Inc.
Sleeping Bag Corporation of America
Smart Shirts Limited
Source 2 International
Southern California Edison Company
Southern Connecticut Gas Company
Stahl-Urban Company

Surrey Place Ltd. (Canada)
Swift Textiles, Inc.
Swift Textiles International Corporation
Systems Management Inc.
Telenova, Inc.
Thermasol, Ltd.
Titan Wood Products Limited
Tri-W Corporation
Union Electric Company
Unity Oil Inc.
Universal Health Services, Inc.
U.S. Windpower, Inc.
Vadetac Corporation
Vetements En Vogue Ltee.
Wadsworth Control Systems, Inc.
Welsbach Concrete Systems Corp.
Wenzel Company, The
Western Pennsylvania Water Company
116975 Canada Ltd.
Woodlands Mall

Office - Supreme Court, U.S.
FILED
FEB 10 1984
ALEXANDER L. STEVAS,
CLERK

No. 83-1127

In the Supreme Court of the United States

OCTOBER TERM, 1983

SEARS, ROEBUCK AND CO., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

In the Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-1127

SEARS, ROEBUCK AND CO., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the court of appeals erred in reversing an order dismissing an indictment on grounds of prosecutorial misconduct.

On February 26, 1980, petitioner was charged in a 13-count indictment returned in the United States District Court for the Central District of California with various offenses involving the overstating to custom agents of the price it had paid for television receivers purchased from Japanese manufacturers. Count 1 charged petitioner with conspiring to defraud the United States and to commit customs law violations, in violation of 18 U.S.C. 371. Counts 2-13 charged petitioner with entering imported merchandise into the commerce of the United States by means of false statements, in violation of 18 U.S.C. 542. Pet. App. 2a, 25a. On June 2, 1981, the day upon which the

jury trial was to commence, the district court dismissed the indictment on the ground of prosecutorial misconduct in presenting the case to the grand jury. The court of appeals reversed, finding that petitioner had failed to demonstrate that the prosecutor's misconduct abrogated petitioner's Fifth Amendment right to a grand jury indictment (Pet. App. 25a-38a; 719 F.2d 1386).[1]

Thereafter, on January 17, 1984, petitioner was charged in a superseding 13-count indictment returned by a different grand jury in the United States District Court for the Central District of California with conspiring to defraud the United States, in violation of 18 U.S.C. 371 (Count 1); and with making false statements with respect to the purchase price of television receivers, in violation of 18 U.S.C. 1001 (Counts 2-13).[2] On January 27, 1984, the United States moved to dismiss the original indictment because of the return of the superseding indictment. Petitioner opposed dismissal on that ground but urged dismissal under the supervisory power of the district court because of prosecutorial misconduct. On January 30, 1984, the district court took the motions to dismiss under submission.

Petitioner contends here (Pet. 4-9) that the court of appeals erroneously used a de novo standard to review the district court's decision to dismiss the original indictment for prosecutorial misconduct before the grand jury. Petitioner also contends (Pet. 9-11) that the court of appeals

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[1]Judge Norris dissented (Pet. App. 39a-41a). He would have remanded the case to the district court without prejudice to petitioner's right to renew its motion to dismiss the indictment on supervisory power grounds.

[2]While the government's appeal from the dismissal of the first indictment was pending, the court of appeals held that 18 U.S.C. 542 was inapplicable in a case quite similar to this one. *United States* v. *Teraoka*, 669 F.2d 577 (9th Cir. 1982).

applied a wrong standard in finding that there was no prejudicial prosecutorial misconduct justifying dismissal of the indictment. Contrary to petitioner's argument (Pet. 11-13), whatever the merits of petitioner's contentions, they are not presently ripe for review by this Court.[3] The court of appeals' decision places petitioner in precisely the same position it would have occupied if the district court had denied its motion to dismiss. Beyond that, a superseding indictment has been returned, and both parties have filed motions to dismiss the original indictment. In these circumstances, any adverse effect resulting from the conduct of the prosecutor before the first grand jury can be expected to be minimal and cannot in any event be adequately assessed at the present stage of the case. Accordingly, even if the issues presented may not technically be moot at present, review by this Court of the court of appeals' decision is not warranted.[4]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

FEBRUARY 1984

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[3]It is now almost four years since the indictment was returned and more than 32 months since the district court's dismissal order. Further interlocutory review at this time might cause serious additional delay in trial of the charges in the superseding indictment against petitioner.

[4]Because the decision below was made in an interlocutory appeal and motions to dismiss the original indictment are pending in the district court, we are not responding on the merits to the questions presented by the petition. We will file a response on the merits if the Court requests.